(1) FILED

No. 01011317 MAR 06 2002

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

THE ATTORNEY GENERAL OF CANADA,
Petitioner,

v.

RJ REYNOLDS TOBACCO HOLDINGS, INC.; RJ REYNOLDS TOBACCO COMPANY; RJ REYNOLDS TOBACCO INTERNATIONAL, INC.; RJR-MACDONALD, INC.; RJ REYNOLDS TOBACCO COMPANY, PR; NORTHERN BRANDS INTERNATIONAL, INC.; AND CANADIAN TOBACCO MANUFACTURERS COUNCIL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit improperly expanded the "revenue rule" to bar Canada's valid civil RICO claims arising out of smuggling and other illegal activities in the United States.

PARTIES TO THE PROCEEDING

Plaintiff-appellant below, and petitioner in this Court, is the Attorney General of Canada.

Defendants-appellees below, and respondents in this Court, are:

RJ Reynolds Tobacco Holdings, Inc.;

RJ Reynolds Tobacco Company;

RJ Reynolds Tobacco International, Inc.;

RJR-MacDonald, Inc.;

RJ Reynolds Tobacco Company, PR;

Northern Brands International, Inc.; and

Canadian Tobacco Manufacturers Council.

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THE ATTORNEY GENERAL OF CANADA,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Canada respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the district court dismissing petitioner's complaint is reported at 103 F. Supp. 2d 134 (N.D.N.Y. 2000) and is reproduced as Appendix B, *infra*. The Second Circuit's decision affirming the district court is reported at

268 F.3d 103 (2d Cir. 2001) and is reproduced as Appendix A, *infra*. The Second Circuit's order denying rehearing and rehearing *en banc* is unpublished and is reproduced as Appendix C, *infra*.

JURISDICTION

The Second Circuit issued its decision on October 12, 2001 and its order denying rehearing and rehearing *en banc* on December 12, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"), the mail fraud statute, 18 U.S.C. § 1341, and the wire fraud statute, 18 U.S.C. § 1343, are set forth in Appendix D, *infra*.

STATEMENT

Canada alleged in this civil RICO action that respondents conducted one of the largest smuggling operations in U.S. history, funneling billions of cigarettes from the United States into Canada without paying applicable Canadian taxes, and that in doing so respondents repeatedly violated the U.S. mail and wire fraud statutes. But a majority of a Second Circuit panel rejected Canada's claims as a matter of law by significantly expanding a common law doctrine known as the "revenue rule."

The revenue rule has traditionally prevented foreign nations from projecting their sovereignty into this country by bringing tax claims arising under *their own* laws in courts of the United States. But in this case the Second Circuit concluded, without any precedent, that the revenue rule also bars a foreign nation from bringing civil claims arising under *the laws of the United States*, for damages caused by

activities of U.S. persons in the United States, where those activities have deprived the foreign nation of revenue.

The Second Circuit's creation of a new common law barrier to an entire class of civil actions threatens grave mischief. The decision prevents U.S. courts from enforcing U.S. laws. If left standing, it will cripple efforts by victim countries to deter smuggling by pursuing civil claims in the United States against smugglers operating here. And if adopted by other countries, the decision will similarly thwart U.S. efforts to pursue smugglers and other criminals operating abroad.

The Facts

As alleged in Canada's complaint, the facts are as follows:

In 1991, Canada doubled its taxes on tobacco products in an effort to reduce consumption of tobacco by young people. App. A, *infra*, at A4. To maintain their sales in Canada and evade the taxes, respondents RJ Reynolds Tobacco Holdings, Inc. ("RJR Holdings," which was then known as "RJR Nabisco") and its U.S. and Canadian affiliates devised a scheme to smuggle billions of cigarettes from the United States into Canada. *Id.*

The scheme involved the export of Canadian cigarettes from Canada (where in 1991 exported cigarettes were not taxed) to U.S. foreign trade zones. The cigarettes were then sold to U.S. "distributors" known to be connected to smugglers on the St. Regis/Akwesasne Indian Reservation. The smugglers used the Reservation (which spans the U.S.-Canada border between New York and Ontario and Quebec) to smuggle the cigarettes back into Canada. *Id.* at A4-A5.

When Canada imposed a tax on exported cigarettes in 1992, respondents began to export Canadian-style tobacco from Canada to Puerto Rico, where it was manufactured into cigarettes and packaged to look like cigarettes made in

Canada. These cigarettes were smuggled into Canada in a similar manner. *Id.* at A5. Respondent RJ Reynolds Tobacco Company PR ("RJR Puerto Rico") manufactured about one billion "Canadian" cigarettes per year in 1992 and 1993 for smuggling into Canada via upstate New York. *Id.* The smuggling scheme continued through the late 1990s. *Id.*

The smuggling scheme was directed and largely carried out in the United States. Respondent RJR Holdings and all of its respondent subsidiaries except RJR-MacDonald are incorporated and headquartered in the United States. *Id.* at A4. To implement the scheme, respondents formed respondent Northern Brands International, Inc. ("NBI"), a Delaware subsidiary of RJR Holdings with headquarters in Winston-Salem, North Carolina. *Id.* at A5. Respondents directed their smuggling activities through NBI in Winston-Salem. *Id.* There was extensive use of U.S. mails and U.S. wires for the purpose of implementing the scheme. *Id.*

In 1997 and 1998, after Canadian and U.S. law enforcement authorities shared information regarding parallel smuggling investigations, the United States indicted NBI and 21 individuals for their participation in the smuggling scheme. *Id.* NBI pleaded guilty to aiding and abetting the fraudulent introduction of merchandise and tobacco into the United States, and individuals pleaded guilty to wire fraud aimed at the Canadian and United States Governments, conspiring to aid and abet smuggling, money laundering, and criminal RICO violations. *Id.* at A5-A6. *See generally United States v. Miller*, 26 F. Supp. 2d 415 (N.D.N.Y. 1998).

Proceedings Below

Canada brought the present case in 1999 in the U.S. District Court for the Northern District of New York. Canada alleged, in pertinent part, that the smuggling scheme involved a number of interstate "criminal enterprises" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c); that each of the respondents was associated with these enterprises and

conducted or participated in the management of their affairs; that respondents engaged through the enterprises in a pattern of unlawful activity within the meaning of 18 U.S.C. §§ 1961(l)(B), 1961(5) and 1962(c), including multiple, repeated and continuous instances of mail fraud and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343; and that Canada was injured in its "business or property" within the meaning of 18 U.S.C. § 1964(c) by, *inter alia*, being deprived of tax revenues. Canada sought damages based on the tax revenues it had lost, as well as its increased law enforcement costs incurred in combating respondents' illegal smuggling activities. Canada also sought disgorgement of respondents' profits and equitable relief. App A, *infra*, at A6-A7.

The district court dismissed the complaint. App. B, *infra*, at B41. The district court recognized that Canada is a "person" eligible to bring a RICO claim, citing *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 313-14 (1978) (foreign sovereign is a "person" with standing to bring claims under Section 4 of the Clayton Act, on which the civil-claims provision of RICO was modeled). App. B, *infra*, at B30. And there was no dispute that the predicate offenses, mail and wire fraud, reach schemes to evade taxes (because taxes are "property"[1]), and reach frauds against foreign victims.[2]

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[1] *Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 314, 317 (7th Cir. 1985) (allowing RICO claim because "the Illinois Department of Revenue has been injured in its property to the extent that it has been defrauded out of $14,500 in unpaid taxes"); *United States v. Dale*, 991 F.2d 819, 849 (D.C. Cir. 1993) (wire fraud statute reaches schemes to evade federal taxes); *United States v. Helmsley*, 941 F.2d 71, 93-95 (2d Cir. 1991) (same as to state taxes); *United States v. Porcelli*, 865 F.2d 1352, 1355 (2d Cir. 1989) (sales tax evasion is RICO predicate act).

[2] *See, e.g., Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1358-59 (9th Cir. 1988) (*en banc*) ("gravamen of the Republic's entire [RICO] case is . . . that the Marcoses stole [the Republic's] money").

But the court said that in order for Canada to show that it was "injured in its business or property" by being cheated out of tax revenues, Canada would have to prove that the scheme "actually evaded" Canadian taxes, and that this would require the court to "pass on . . . the validity of the Canadian revenue laws and their applicability hereto," a step it described as "precisely the type of meddling in foreign affairs the Revenue Rule forbids." App. B, *infra*, at B16-B17. The court also held that Canada could not recover its law enforcement costs, which were not "business or property," *id.* at B39-B40, and rejected Canada's claims for disgorgement and equitable relief, *id.* at B40.

The Second Circuit affirmed. The majority (Judge Katzmann and District Judge Kaplan) ruled that "in a civil case" a U.S. court may not "determine the validity of a foreign tax law or the extent of liability thereunder and award that amount to a foreign sovereign." App. A, *infra*, at A37. The majority declined to apply the Second Circuit's own recent decisions in *United States v. Trapilo*, 130 F.3d 547, 552-53 (2d Cir. 1997), and *United States v. Pierce*, 224 F.3d 158, 165-66 (2d Cir. 2000), holding that a U.S. prosecution for wire fraud and other offenses in connection with cross-border smuggling into Canada was *not* barred by the revenue rule and that U.S. prosecutors could (indeed, must) prove that Canadian tax laws gave Canada the right to collect the excise taxes at issue. App. A, *infra*, at A34-A37. The majority attempted to distinguish *Trapilo* and *Pierce* on the ground that they were criminal cases and this is a civil RICO case. *Id.*[3]

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[3] That distinction is inconsistent with this Court's prior admonition in *Sedima S.P.R.L v. Imrex Co.*, 473 U.S. 479, 498 (1985), that courts do not have license to erect special barriers to civil RICO actions. In *United States v. Boots*, 80 F.3d 580, 585-98 (1st Cir. 1996), the First Circuit overturned *criminal* wire fraud convictions arising out of a smuggling operation similar to the one at issue in this case, on the ground that the

The panel concluded that "the revenue rule bars Canada's action in its entirety." *Id.* at A10. The panel did not discuss whether disgorgement and equitable relief, based on respondents' illicit profits rather than petitioner's lost revenues, are available in a civil RICO action, saying simply that "all of Canada's claims are barred by the revenue rule." *Id.* at A55-56.

Judge Calabresi dissented. He noted that "[o]n its face . . . the revenue rule has nothing to do with this case." *Id.* at A56. He explained that the rule, as stated by the authorities, bars U.S. courts from deciding unadjudicated tax claims of other sovereigns under their own laws, and claims based on foreign "final tax judgments." *Id.* at A57. This case, by contrast, "simply is an action for damages provided for and brought under federal law." *Id.* "The Canadian tax laws come into play only indirectly, as a factor to be used in the calculation of damages, and do so entirely because the RICO statute itself makes the Canadian laws relevant to that calculation." *Id.*

Judge Calabresi also rejected each of three reasons advanced by the majority for extending the rule to the present context. He explained that since Canada's claims arise under U.S. federal law, (a) Canada is not seeking to give its own laws extraterritorial effect; and (b) there is no prospect of the courts trespassing on the foreign policy or other prerogatives of the Executive and Legislative branches, which created the rule of decision in this case by enacting RICO. *Id.* at A58-A60. With respect to (c) "the alleged difficulty in figuring out the meaning and significance of some foreign laws –

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revenue rule barred even U.S. criminal prosecution for schemes to defraud a foreign nation of tax revenue. The Second Circuit expressly reached the opposite conclusion with respect to criminal prosecution in *Trapilo* and *Pierce*. *See* 130 F.3d at 552-53; 224 F.3d at 165-66. The *Boots* court rejected the civil/criminal distinction on which the majority here relied. 80 F.3d at 595-98.

especially foreign tax laws," Judge Calabresi noted that the Second Circuit had rejected any such objection in *Trapilo* and *Pierce*. *Id.* at A60-A65. He concluded that while the federal courts "have no obligation to further Canada's sovereign interests," they "are bound to entertain suits brought under federal statutes, and to award the damages that such statutes establish." *Id.* at A59.

Judge Calabresi concluded his dissenting opinion by noting that while he shares the majority's discomfort with certain aspects of RICO, he could not "join an opinion that applies an old and dubious common law rule, in ways that have nothing to do with its roots or rationales, in order to limit an act of Congress that the Supreme Court has repeatedly applied in the broadest possible ways." *Id.* at A66-A67.

The Second Circuit denied Canada's petition for rehearing and suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

The Second Circuit expanded the revenue rule in a way that significantly restricts enforcement of *U.S.* law. This decision is without precedent and eliminates a major weapon in the worldwide battle against smuggling and other forms of organized crime. Traditionally, the revenue rule has barred other nations from extending their sovereignty into the courts of the United States by bringing tax claims arising under their laws. By contrast, the decision below would bar U.S. courts from civilly enforcing U.S. laws against U.S. criminals—the exact opposite of protecting U.S. legal sovereignty within its own territory—whenever the plaintiff is another nation cheated of revenues. Such a rule would deprive the United States of the full civil-plaintiff enforcement of U.S. laws that Congress created the civil RICO statute to provide. And if other countries that have traditionally applied the revenue rule follow the Second Circuit's lead, the United States will be similarly unable to

pursue foreign wrongdoers abroad for violating the laws of their own countries.

The Court has repeatedly granted the Writ in cases raising important issues about the rights of foreign nations and persons to proceed or be proceeded against in the courts of the United States. The Court should do so here.

A. The Second Circuit's Expansion of the Revenue Rule Presents an Important Question of Federal Law.

The common law revenue rule states that the courts of one nation are "not required to recognize or to enforce judgments for the collection of taxes, fines or penalties rendered by the courts of other states." *Restatement (Third) of the Law of Foreign Relations* § 483 (1987). Some authorities describe the rule as also barring one country from bringing unadjudicated tax claims, arising under its own laws, in the courts of another country. *See, e.g., Government of India v. Taylor*, [1955] A.C. 491, 492-93, 503-05.

This Court has described the revenue rule as part of a more general rule that "a court will not entertain a cause of action arising in another jurisdiction." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964). The most frequent explanation of the rule is that as a matter of international relations (and, in the United States, separation of powers) no nation may project its sovereignty into another's courts, and each nation should determine as a question of foreign policy whether and when it is willing to enforce the penal and revenue laws of another nation. *Moore v. Mitchell*, 30 F.2d 600, 601-02 (2d Cir. 1929).

The revenue rule has no application to Canada's claims, which did not "aris[e] in another jurisdiction." Canada came to a U.S. court to enforce U.S. statutory law, in the manner prescribed by that law, against defendants who are primarily U.S. persons and whose unlawful acts occurred primarily in the United States. There is no foreign-policy reason why

Canada should have a lesser right to pursue its U.S. law claims than other civil plaintiffs.[4]

There is no material dispute about Canadian tax law, nor any reason to believe that Canada's proof of damages will be impermissibly speculative. *See* App. B, *infra*, at B16 n.4. Computations of amounts due under foreign laws, as one factual element in a claim arising under U.S. laws, are neither uncommon nor problematic. *See, e.g., United States v. Chmielewski*, 218 F.3d 840, 841 (8th Cir. 2000) (computing criminal sentence by reference to amount of foreign tax losses); *Biddle v. Commissioner*, 302 U.S. 573, 579 (1938) (examination of British tax law for purposes of applying U.S. tax law); *see also* Fed. R. Civ. P. 44.1 (establishing procedures for making determinations of foreign law).

The Second Circuit never grappled with the lack of precedent or logical support for extending the revenue rule to bar an otherwise valid claim arising under the law of the *forum*, in this case the United States. The majority discussed at length the validity of the revenue rule itself[5] and the

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[4] It is clear that a friendly foreign nation is "allowed to sue in the courts of the United States." *Sabbatino*, 376 U.S. at 408-09. In such a suit, the Act of State doctrine requires the U.S. court to assume the validity of foreign laws and other sovereign acts that may be pertinent to the U.S. law claim—not to reject them out of hand, as the Second Circuit did here. *See W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990).

[5] The revenue rule has been sharply criticized since the nineteenth century. *See, e.g.*, J. Story, *Commentaries on the Conflict of Laws* 338-39 (Bigelow ed., 8th ed. 1883) (observing that the revenue rule is "inconsistent with good faith and moral duties of nations"); 3 J. Kent, *Commentaries on American Law* 265 (O.W. Holmes, Jr., ed., 12th ed., John M. Gould ed., 14th ed., 1896) (describing the rule as "laying down an exceedingly lax morality"). Indeed, Justice Story remarked in *The Anne*, 1 F. Cas. 955, 956 (C.C.D. Mass 1818) (No. 412), that he was "staggered" by the rule. Current commentators are no kinder. *See also, e.g.*, William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: An*

history of the U.S-Canada tax treaty (which never mentions the rule). *See* App. A, *infra*, at A10-A34, A40-A47. But it did not explain why Canada should receive worse treatment in U.S. courts than other plaintiffs deprived of money by a U.S. criminal enterprise, or what foreign policy objective would be served by disregarding both U.S. and Canadian laws. Its decision imposed a significant but erroneous limitation on *U.S.* sovereignty while rejecting the valid claim of a friendly foreign nation. The holding serves no interest except that of the alleged criminals.

B. THE SECOND CIRCUIT'S DECISION IS CONTRARY TO THE PLAIN LANGUAGE AND PURPOSE OF CIVIL RICO.

The RICO statute authorizes "any person" injured in his business or property to bring a civil RICO action. 18 U.S.C. § 1964(c). Congress created this private right of action and conferred it upon any person injured by a RICO violation in order to create an army of "'private attorneys general' dedicated to eliminating racketeering activity." *Rotella v. Wood*, 528 U.S. 549, 557 (2000).

"RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985). It was designed to "attack[] crime on all fronts," and "it is in this spirit that all of the Act's provisions should be read." *Id.*

Argument for the Revocation of the Revenue Rule, 22 Hous. J. Int'l L. 265 (2000); *Banco Frances e Brasileiro S.A. v. Doe*, 370 N.Y.S.2d 534, 538 (1975) (expressing doubt that "the reasons for the rule, if ever valid, remain so" and suggesting abandonment of the rule); *Restatement (Third) of The Law of Foreign Relations* § 483, Reporter's Note 2 (1987) (rule is "largely obsolete"). Even the district court below observed that the rule is probably "outdated" and that its various rationales are "unpersuasive." App. B, *infra*, at B11 n.3.

In expanding the revenue rule to bar RICO actions by foreign countries, the Second Circuit disregarded this recognized Congressional objective. This Court has "often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes." *Perma Life Mufflers Inc. v. International Parts Corp.*, 392 U.S. 134, 138-39 (1968), *overruled on other grounds, Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). But that is precisely what the Second Circuit has done in this case.

C. The Second Circuit's Decision Will Significantly Undermine Efforts To Combat International Smuggling.

"Private attorneys general" are particularly important in combating racketeering activities connected to international smuggling. As this case illustrates, foreign nations are often primary victims of smuggling activities in violation of U.S. laws, with strong motivation to act against it. As here, U.S. prosecutors fighting fraud and other racketeering activities in the United States in connection with illegal smuggling of goods into other countries often *need* the help of those countries, including the help they can provide by bringing claims against the smugglers. And when the United States is the victim of smuggling from elsewhere, it may need access to foreign courts to find perpetrators, secure evidence, and press claims under foreign laws.

The Second Circuit's decision cripples this effort. It bars the principal victim of crimes perpetrated in the United States from the civil remedy Congress provided in our courts. And instead of "attacking crime on all fronts," the decision gives organized criminals located in the United States immunity from civil claims based on violations of this country's criminal laws, whenever the intended effect of their crime is to defraud a foreign country of tax revenue. Foreign nations are deprived of compensation, and the United States is deprived of the vigorous enforcement of its own laws that

Congress sought to engender by conferring a private right of action upon "any person" injured by a RICO violation.

The issue—whether one country may pursue smugglers operating in another country for violating the laws of that country—has enormous immediate practical importance. Cigarette smuggling cost Canada approximately $2 billion in lost tax revenue in one year alone.[6] But organized cigarette smuggling by U.S. tobacco companies is not limited to Canada.[7] It is a global problem, and civil RICO actions have been brought by the European Community and by Departments of Colombia. *See The European Community v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456 (E.D.N.Y. 2001) (holding, prior to the Second Circuit's decision in this case, that the revenue rule did *not* bar civil RICO claims for cigarette smuggling and related racketeering activities); *The European Community v. Japan Tobacco, Inc.*, 2002 WL 234241 (E.D.N.Y. Feb. 19, 2002) (dismissing complaint with leave to re-plead after the Second Circuit's ruling in this case).

Cigarette smuggling is a massive industry that has been used to finance terrorism and other forms of organized crime. As former U.S. Customs Commissioner Raymond W. Kelly reported to Congress:

> International cigarette smuggling has grown to a multi-billion dollar a year illegal enterprise linked to transnational organized crime and

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[6] United States General Accounting Office, *Cigarette Smuggling: Information on Interstate and U.S.-Canadian Activity*, May 4, 1998, at 5, *available at* http://www.gao.gov/archive/1998/rc98182t.pdf.

[7] U.S. Government, *International Crime Threat Assessment, December 2000, Chapter II, International Crimes Affecting U.S. Interests, Contraband Smuggling Out of the United States* at 38, *available at* http://clinton4.nara.gov/WH/EOP/NSC/html/documents/pub45270/pub45270index.html.

> international terrorism. Profits from cigarette smuggling rival those of narcotics trafficking. The United States plays an important role as a source and transshipment country. Additionally, large sums of money related to cigarette smuggling flow through U.S. financial institutions. Customs has taken steps to disrupt and dismantle some of the smuggling networks in cooperation with foreign law enforcement officials.[8]

Cigarette smuggling into the United States is also a large problem. Approximately 1.6 billion packs of contraband cigarettes were consumed in the United States in 1999, resulting in combined federal and state tax losses of nearly $1.4 billion.[9] But if other countries follow the Second

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[8] *Opening Statement March 30, 2000, Before the Senate Committee on Appropriations Subcommittee on Treasury and General Government, available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_sapp_tre_1&docid=f:62810.wais; *see also* U.S. Customs Service, *Fraud Investigations, Tobacco Smuggling*, March 30, 2001, *available at* http://www.customs.gov/enforcem/tobacco.htm ("The U.S. Customs Service is actively involved in the investigation of organized international tobacco smuggling. Organized cigarette smuggling generates billions of dollars of profit for criminal organizations around the world. Transnational organized crime groups smuggle cigarettes into or through many nations, including the United States. The proceeds of the smuggling activity is sometimes laundered through U.S. financial institutions. Narco-traffickers and other criminal elements have used cigarette smuggling as a means to launder proceeds from other criminal ventures.... Transnational crime, like legitimate business, is flourishing in today's global economy. Even though the significant revenue loss may occur in another country, transnational criminals have laundered their proceeds in U.S. financial institutions and manipulate or falsify U.S. government documents to further their international smuggling schemes.").

[9] FIA International Research LTD, *Organized Crime and the Smuggling of Cigarettes in the United States—the Year 2000 Update* at 6; *available at* http://www.awmanet.org/IMAGES/update_29sep00.pdf.

Circuit's interpretation of the revenue rule, the United States will be powerless to pursue its rights against smugglers under the civil laws and in the courts of the countries where the smugglers are located.

Cigarette smuggling is just the tip of the iceberg. In 1999, U.S. exports to Canada exceeded $163 billion, and imports from Canada exceeded $198 billion.[10] There are more than 200 million border crossings between the U.S. and Canada each year,[11] and both countries are proud that crossing is easy.

Speaking in Ottawa, Attorney General Ashcroft recently told Canadian officials that "neither of us" can combat transnational crime alone and that each country must work hard to reduce smuggling.[12] But the decision below eliminates one of the most obvious and powerful weapons in this combat: pursuing the smugglers where they are, for damages under the laws of the countries where their wrongs were committed. Canada is aware of no prior case in which a country has refused to enforce its own laws against conduct committed within its own territory merely because another friendly nation was the plaintiff.

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[10] *2000 National Trade Estimate Report on Foreign Trade Barriers*, at 30, *available at* http://www.ustr.gov/pdf/nte2000.pdf.

[11] *Building A Border for the 21st Century*, Joint Letter to Prime Minister Jean Chretien and President William J. Clinton, *available at* http://www.can-am.gc.ca/menu-e.asp?act=v&mid=1&cat=10&did=284.

[12] *Attorney General Prepared Remarks*, June 20, 2001, at 2, *available at* http://www.usdoj.gov/ag/speeches/2001/0620crossborder.htm.

D. This Case Squarely Presents an Important Question Concerning the Rights of Friendly Foreign Nations To Bring Claims Arising Under the Laws of the United States.

The Court has repeatedly granted the Writ, even in the absence of a circuit conflict, in cases involving the rights of foreign nations to proceed or be proceeded against in the courts of the United States. In *Pfizer*, *supra*, for example, the Court granted the writ to decide "whether a foreign nation is entitled to sue in our courts for treble damages under the antitrust laws . . . ." 434 U.S. at 309. And in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 482 (1983), the Court granted the writ "to consider whether the Foreign Sovereign Immunities Act of 1976, by authorizing a foreign plaintiff to sue a foreign state in the United States district court on a nonfederal cause of action, violates Article III of the Constitution." One obvious reason why such cases present issues of immediate importance is that foreign courts may follow U.S. lower-court decisions in interpreting their own countries' laws, creating bad precedents that may not be corrected when this Court eventually resolves the U.S. law issue.[13]

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[13] The same reasoning may have prompted the Court's grant of the writ—without a circuit conflict—in a number of cases involving the rights of foreign commercial interests in U.S. courts. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) (certiorari to decide whether Japanese television manufacturers could be held liable under U.S. antitrust laws for conspiracy partly compelled by foreign sovereign); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624 (1985) (certiorari "to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction"); *Helecopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 409 (1984) (certiorari to determine extent of contacts necessary to support general jurisdiction over foreign corporation); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 408 (1982) (certiorari to address constitutionality of state law tolling limitation period for action against a

This case presents similar reasons for acting immediately. Second Circuit law is important in itself. New York is the world's most important center of international trade and commerce. The Second Circuit's decision, if left standing, will permit smuggling operations from bases in New York into Canada and other nations without fear of civil liability in the U.S. for the foreign taxes that the smugglers evade.

But even more important, the Second Circuit's decision may provoke mischief that this Court will not have the power to correct. As the majority's opinion demonstrates, one country's revenue rule cases are frequently cited in other countries. App. A, *infra*, at A11-A12. If the Second Circuit's extension of the rule to cases arising under the law of the forum is adopted in other countries (in cases in which the United States may or may not be a party), this Court will not have the power to return the genie to his bottle.

This case presents an excellent vehicle for resolving the issue. Canada's RICO claim is clear and presents no legal issues that would interfere with the Court's consideration of the revenue rule issue. The decision below, squarely based on the revenue rule, ends the case. The issue is analyzed at length in the opinions below, including Judge Calabresi's forceful dissent. There could not be a better vehicle for deciding whether the revenue rule bars valid claims of a foreign sovereign that arise under United States law.

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foreign corporation); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 371-72 (2000) (certiorari to consider questions of foreign affairs power, application of "dormant Foreign Commerce Clause," and federal preemption of state law restricting procurements from Burma).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 2002

APPENDICES

APPENDIX A

268 F.3d 103

The ATTORNEY GENERAL OF CANADA,
Plaintiff-Appellant,
v.
R.J. REYNOLDS TOBACCO HOLDINGS, INC., R.J. Reynolds Tobacco Co., R.J. Reynolds Tobacco International, Inc., RJR-MacDonald, Inc., R.J. Reynolds Tobacco Company, Puerto Rico, Northern Brands International, Inc., and Canadian Tobacco Manufacturers Council,
Defendants-Appellees.

No. 00-7972.

United States Court of Appeals,
Second Circuit.

Argued May 30, 2001.
Decided Oct. 12, 2001.

Philip S. Beck (Fred H. Bartlit, Jr., Jason L. Peltz, Lester C. Houtz, Christopher D. Landgraff, Karma M. Giulianelli, on the brief), Bartlit Beck Herman Palenchar & Scott, Chicago, IL; G. Robert Blakey, Notre Dame, IN; Robert A. Barrer, Hiscock & Barclay, LLP, Syracuse, NY, on behalf of Plaintiff-Appellant The Attorney General of Canada.

Jeffrey S. Sutton, Jones, Day, Reavis & Pogue, Columbus, OH; Timothy J. Finn, Christopher F. Dugan, Jones, Day, Reavis & Pogue, Washington, DC; Alan S. Burstein, Scolaro, Shulman, Cohen, Lawler & Burstein, P.C., Syracuse, NY, on behalf of Defendants-Appellees R.J. Reynolds Tobacco Holdings, Inc. and R.J. Reynolds Tobacco Co.

William C. Hendricks, III, King & Spalding, Washington, DC; Richard A. Schneider, King & Spalding, Atlanta, GA; Patricia A. Griffin & Danielle Sallah, King & Spalding, New York, NY, on behalf of Defendant-Appellee The Canadian Tobacco Manufacturers Council.

C. Stephen Heard, Jr. (Charles Sullivan, Kerry S. Sullivan, Edmund M. O'Toole, on the brief), Sullivan & Heard LLP, New York, NY, on behalf of Defendants-Appellees R.J. Reynolds Tobacco International, Inc., R.J. Reynolds Tobacco Company, PR, RJR-MacDonald, Inc., and Northern Brands International, Inc.

John J. Halloran, Jr. (Frank H. Granito, III, Frank H. Granito, Jr., Kenneth P. Nolan, on the brief), Speiser Krause Nolan & Granito, New York, NY; Kevin A. Malone & Carlos A. Acevedo, Krupnick Campbell Malone Roselli Buser Slama Hancock McNelis Liberman & McKee, Fort Lauderdale, FL; Andrew B. Sacks, Stuart H. Smith, John K. Weston, Sacks and Smith, L.L.C., New Orleans, LA, on behalf of Amicus Curiae The European Community.

Jan Amundson, National Association of Manufacturers, Washington, DC, Robin S. Conrad, National Chamber Litigation Center, Inc., Washington, DC, Theodore B. Olson (Thomas G. Hungar, Jeffrey A. Wadsworth, on the brief), Gibson, Dunn & Crutcher LLP, Washington, DC, on behalf of Amici Curiae The National Association of Manufacturers and The United States Chamber of Commerce.

Before CALABRESI and KATZMANN, Circuit Judges, and KAPLAN, District Judge.[1]

KATZMANN, Circuit Judge:

This action was brought by the Attorney General of Canada ("Canada") on behalf of the government of Canada for damages based on lost tax revenue and additional law enforcement costs. Canada alleges that these damages resulted from a scheme facilitated by defendants to avoid various Canadian cigarette taxes by smuggling cigarettes across the United States Canadian border for sale on the Canadian black market. Under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, Canada seeks revenue that it lost "from the evasion of tobacco duties and taxes," and from "[d]efendants' conduct [that] compelled [Canada] to rollback duties and taxes," as well as monies spent "seeking to stop the smuggling and catch the wrongdoers."

This case involves the construction of RICO in light of the common law doctrine known as the "revenue rule," a long established feature of the law of the United States and other nations including Canada, which holds that the courts of one sovereign will not enforce the tax judgments or claims of another sovereign. RICO broadly created a civil treble damages remedy for any person injured in its business or property by reason of a violation of the statute. Canada's action proceeds on the premise that the taxes it allegedly lost as a result of defendants' alleged RICO violations fall within RICO's damages provision. As the relief Canada seeks would be foreclosed by the revenue rule in the absence of RICO, and as there is no indication that Congress intended RICO to abrogate the revenue rule with respect to claims brought by foreign sovereigns under the statute, we have no choice but to conclude that RICO may not be used by Canada to seek re-

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[1] The Honorable Lewis A. Kaplan of the United States District Court for the Southern District of New York, sitting by designation.

covery of lost tax revenues and tax enforcement costs as RICO damages. We therefore affirm. Although the judiciary can do no more, we note that Canada can seek recourse through the political branches – the executive and Congress.

Background

Unless otherwise noted, the facts that follow are drawn from the complaint and Civil RICO Statement, the latter filed pursuant to Local Rule 9.2 of the Northern District of New York. On a motion to dismiss, the court must accept as true all of the factual allegations in the complaint, make inferences from those allegations in the light most favorable to plaintiff, and liberally construe the complaint. *See, e.g., Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir.2001).

Defendants RJR-MacDonald ("RJR MacDonald"), a Canadian company, and American companies R.J. Reynolds Tobacco Holdings, Inc. ("Holdings"), Northern Brands International, Inc. ("NBI"), R.J. Reynolds Tobacco Company ("RJR US"), R.J. Reynolds Tobacco International, Inc. ("International"), and R.J. Reynolds Tobacco Company PR ("RJR PR") (collectively "defendants") manufactured and distributed cigarettes during the period relevant to this action. Defendant Canadian Tobacco Manufacturers Council is a trade association to which RJR- MacDonald belongs.

In 1991, Canada doubled its cigarette taxes, raising the average price of a carton of cigarettes from $26 (Canadian) in 1989 to $48 (Canadian) in 1991. After this tax increase, RJR-MacDonald's sales and market share declined. In order to decrease sales prices and increase consumption, defendants developed a scheme to avoid paying Canadian cigarette taxes. They exported cigarettes from Canada to the United States, and RJR-MacDonald falsely declared to Canadian officials that the cigarettes were not for consumption in Canada. Defendants then sold the cigarettes to distributors, whom defendants knew were smugglers, who resold the cigarettes to Canadian black-market distributors. At least some of the smug-

gling was conducted by selling the Canadian cigarettes to residents of the St. Regis/Akwesasne Indian Reservation ("Reservation") on the New York-Canadian border. The scheme was then refined to take advantage of the Foreign Trade Zones ("FTZs") in upstate New York. Defendants exported Canadian cigarettes from Canada to the FTZs, where they were delivered to distributors who shipped the cigarettes to the Reservation. The distributors then smuggled the cigarettes back into Canada.

In 1992, Canada imposed a tax of $8 (Canadian) on each carton of exported cigarettes. To avoid this tax, defendants shipped raw Canadian tobacco to Puerto Rico, where RJR PR manufactured Canadian-style cigarettes made to look as if they had been made by RJR-MacDonald in Canada. These cigarettes were delivered directly or through Caribbean intermediaries to FTZs in New York, then brought to the Reservation to be smuggled into and sold in Canada. In 1992 and 1993, RJR PR manufactured approximately one billion Canadian-style cigarettes each year. RJR-MacDonald also employed Standard Commercial in North Carolina to process Canadian tobacco and package it as an RJR-MacDonald product. The tobacco was then smuggled into Canada for sale on the black market.

In 1993, in an effort to conceal their relationship with smugglers, defendants created NBI and directed their Canadian sales through it. Defendants' Canadian sales increased, and defendants made several hundred million dollars in profit. In 1994, Canada lowered its cigarette taxes. NBI liquidated its inventory at the FTZs by selling the cigarettes at low prices. Defendants continued their smuggling scheme at low levels between 1995 and 1998.

In conducting this scheme, defendants used the United States mails and wires to make payments and to place and receive orders. In 1997 and 1998, the United States indicted NBI and 21 individuals in connection with these smuggling activities. In 1998, NBI pled guilty to aiding and abetting the

introduction of merchandise into the United States by means of false and fraudulent practices. Several individuals involved in the scheme pled guilty to crimes such as wire fraud, aiding and abetting smuggling, conspiring to defraud the United States, currency violations, money laundering and criminal RICO violations.

In the present action, Canada brings claims against defendants under RICO's civil enforcement provision. RICO is a broadly worded statute that "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S.Rep. No. 91-617, at 76 (1969); *see* Statement of Findings and Purpose, Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 922, 922-23 (1970). "RICO provides that '[a]ny person injured in his business or property by reason of' a RICO violation may bring a civil action to recover treble damages." *Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2d Cir.1992) (quoting 18 U.S.C. § 1964(c)), *cert. denied*, 508 U.S. 952, 113 S.Ct. 2445, 124 L.Ed.2d 662 (1993). "To establish a RICO claim, a plaintiff must show: (1) a violation of the RICO statute ...; (2) an injury to business or property; and (3) that the injury was caused by the violation of [RICO]." *De Falco v. Bernas*, 244 F.3d 286, 305 (2d Cir.2001) (internal quotation marks and citation omitted), *cert. denied*, --- U.S. ---, 122 S.Ct. 207, --- L.Ed.2d --- (2001). Canada alleges that defendants violated RICO by "conduct [ing] or participat[ing] ... in the conduct of [an] enterprise's affairs through a pattern of racketeering activity," namely repeated instances of mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343, in violation of 18 U.S.C. § 1962(c). Second, Canada alleges a conspiracy, in violation of 18 U.S.C. § 1962(d), to violate subsections (a), (b) and (c) of section 1962.[1]1 Canada explains that these RICO violations

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[1] Subsection (a) bars the use or investment of racketeering-derived funds in an enterprise engaged in or affecting interstate or foreign commerce,

were the proximate cause of injury to its "property" because it was deprived of revenue from tobacco duties and taxes and was forced to spend money to stop defendants' illegal activity.

Defendants moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In a thorough and thoughtful opinion, the district court rejected some of the grounds of defendants' motion, finding that Canada is a "person" entitled to bring a RICO action and refusing to dismiss the action under the act-of-state and political-question doctrines. *See Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc.*, 103 F.Supp.2d 134, 144-50 (N.D.N.Y.2000). Nonetheless, the district court granted the motion to dismiss because it held that Canada's lost revenue claims were barred by the revenue rule; that a government's claim for damages based on increased law enforcement and related costs does not satisfy civil RICO's requirement that the plaintiff suffer an injury to its commercial interests; and that RICO does not provide for the disgorgement and other equitable relief requested by Canada. *See id.* at 140-44, 150-55. With regard to the revenue rule, the district court explained:

> Recognizing the existence of the Revenue Rule ... only begs the impending question – whether the instant civil RICO claim commenced by Canada is precluded by that rule.
>
> * * * * * *
>
> The problem arises when we look back to the standing and recovery requirements of a claim under 18 U.S.C. § 1964(c) and, in particular, the requirement that a civil RICO plaintiff allege injury to business or property.

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while subsection (b) bars the acquisition or maintenance of an interest in such an enterprise through racketeering.

* * * * * *

Again, to have standing and to recover, Canada must allege injury in fact, which ultimately obligates it to prove that some act or acts in furtherance of the scheme caused it to sustain injury.

* * * * * *

Certain of the types of injuries alleged by Canada, namely lost revenues resulting from the evasion of duties and taxes, require it to show that the scheme utilizing the mails and wire communications to defraud it out of tax revenue was successful (at least, in part, insofar as it actually evaded Canadian tax laws thereby causing Canada to lose revenue).... Thus, to pursue its claim for damages relating to lost tax revenue, Canada will have to prove, and the Court will have to pass on, the validity of the Canadian revenue laws and their applicability hereto and the Court would be, in essence, enforcing Canadian revenue laws. Enforcing foreign revenue laws is precisely the type of meddling in foreign affairs the Revenue Rule forbids.

* * * * * *

The fact that the executive branch of the United States Government has seen fit to enter into treaties with Canada with respect to the recognition and enforcement of certain tax liabilities, to delineate the extent to which one country's revenue claims may be enforced in the other, and to limit such enforcement to "finally determined" revenue claims, strongly suggests that Canada's RICO claim would draw this Court's "inquiry into forbidden wa-

> ters reserved exclusively to the legislative and executive branches of our government." As long as the Revenue Rule prevails (as evidenced by Second Circuit precedent and the Treaty), this Court is precluded from affording the Canadian government an alternative mechanism not expressly authorized by the legislative and/or executive branches of government – those branches particularly responsible for establishing and conducting international relations – by which it may recoup lost tax revenues in the courts of the United States.

Id. at 141-44 (internal citations and footnote omitted).

Canada appeals the dismissal, arguing that the revenue rule is inapplicable, that it adequately pled the elements of a civil RICO cause of action and is not required to show a commercial injury, and that equitable relief is available, particularly where, as here, the amount of damages may be difficult to prove. Defendants oppose the appeal, arguing that the revenue rule precludes an action for the enforcement of foreign tax claims, that the political-question doctrine bars this action, that Canada failed to plead the commercial injury required by RICO and is not a "person" under RICO entitled to bring the action, and that equitable remedies are unavailable in a civil RICO suit such as this. *Amicus curiae* the European Community urges reversal of the district court, primarily on the ground that the revenue rule is inapplicable and inconsistent with the goals of RICO. *Amici curiae* the National Association of Manufacturers and the United States Chamber of Commerce advocate affirmance, arguing that the revenue rule requires the Court to limit foreign governments' use of United States courts for tax collections, which, if unrestricted, would be harmful to American business interests.

We find that the present case falls within the revenue rule's proscriptions. Moreover, we have found no evidence that Congress intended to limit the revenue rule when it en-

acted RICO. Canada requests that a United States court enforce Canadian tax laws on its behalf. This we cannot do, notwithstanding our deep respect for Canada's views. Accordingly, we hold that the revenue rule bars Canada's action in its entirety and affirm the judgment of the district court.

Discussion

I. The Vitality of the Revenue Rule

The revenue rule is a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns. It has been defended on several grounds, including respect for sovereignty, concern for judicial role and competence, and separation of powers. Examination of both the policies underlying the revenue rule, and the rule's congruence with the international tax policies pursued by the political branches of our government, supports the conclusion that the revenue rule is applicable to the particular facts of the case at hand.

Although the United States Supreme Court and this Circuit have not ruled on the precise scope of the rule, they have acknowledged its continuing vitality in the international context. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 740 n. 3, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988) (Brennan, J., concurring) (noting the rule's continued existence in the nation-to-nation setting); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-14, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (noting the view that many courts in the United States have adhered to the principle that "a court need not give effect to the penal or revenue laws of foreign countries"); *Oklahoma v. Gulf, Colo. & Santa Fe Ry. Co.*, 220 U.S. 290, 299, 31 S.Ct. 437, 55 L.Ed. 469 (1911) ("The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its

revenue or other municipal laws, and to all judgments for such penalties.") (quoting *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U.S. 265, 290, 8 S.Ct. 1370, 32 L.Ed. 239 (1888), *overruled in part by Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 278, 56 S.Ct. 229, 80 L.Ed. 220 (1935)); *United States v. First Nat'l City Bank*, 321 F.2d 14, 23-24 (2d Cir.1963) ("It has long been a general rule that one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim."), *rev'd on other grounds*, 379 U.S. 378, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965); *cf. United States v. Trapilo*, 130 F.3d 547, 551-53 (2d Cir.1997) (appearing to recognize the endurance of the revenue rule in the international context but finding it "inapplicable to the instant case"), *cert. denied*, 525 U.S. 812, 119 S.Ct. 45, 142 L.Ed.2d 35 (1998); *United States v. Pierce*, 224 F.3d 158, 167 (2d Cir.2000) (describing this aspect of *Trapilo*).

The rule has its origin in eighteenth-century English court decisions seeking to protect British trade from the oppressiveness of foreign customs.[2] In *Boucher v. Lawson*, 95 Eng. Rep. 53 (K.B.1734) (Lord Hardwicke, C.J.), the court specifically acknowledged that its concerns with promoting British trade led it to uphold a transaction that violated Portuguese export laws. Chief Justice Lord Hardwicke stated that to do otherwise "would cut off all benefit of such trade from this kingdom, which would be of very bad consequence to the principal and most beneficial branches of our trade." *Id.* at

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[2] *See, e.g.*, J.-G. Castel, *Canadian Conflict of Laws* 63 (1975) (noting that the revenue rule was first formulated "in an era of virulent commercial rivalry"); Richard E. Smith, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, 1981 U. Ill. L.Rev. 241, 246 ("Judicial reluctance to recognize a foreign tax claim or judgment originated in the decisions of the early eighteenth century English courts in an era of intense commercial competition."); *see also* Hans W. Baade, *The Operation of Foreign Public Law*, 30 Tex. Int'l L.J. 429, 438 (1995); Thomas B. Stoel, Jr., *The Enforcement of Foreign Non-criminal Penal & Revenue Judgments in England & the United States*, 16 Int'l & Comp. L.Q. 663, 671 (1967).

56.[3] Since then, the rule has entered United States common law, international law and the national law of other common law jurisdictions.[4] We note that the international acceptance of the revenue rule extends to Canada's Supreme Court and provincial courts.[5]

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[3] *See also Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (K.B.1775) (Lord Mansfield) ("For no country ever takes notice of the revenue laws of another."); *Planche v. Fletcher*, 99 Eng. Rep. 164, 165 (K.B.1779) (Lord Mansfield) ("One nation does not take notice of the revenue laws of another.").

[4] *See, e.g., Aetna Ins. Co. v. Robertson*, 127 Miss. 440, 90 So. 120, 126 (1921) (Ethridge, J., dissenting) ("[I]t is a familiar principle of law that one state or country will not aid another state or country in giving effect to judgments enforcing its penal laws, or in collecting its revenues."); *Henry v. Sargeant*, 13 N.H. 321, 1843 WL 2069 (1843) (collecting cases that support the principle that penal and revenue laws are "strictly local" and are not enforced by foreign states); *State of Colorado v. Harbeck*, 232 N.Y. 71, 85, 133 N.E. 357 (1921) ("The rule [of "private international law"] is universally recognized that the revenue laws of one state have no force in another."); *Williams & Humbert Ltd. v. W & H Trade Marks (Jersey) Ltd.*, [1986] 1 All E.R. 129, 133-34 (H.L.) (Although the "revenue laws may in the future be modified by international convention or by the laws of the European Economic Community [,] ... at present the international rule with regard to the non- enforcement of revenue and penal laws is absolute."); *Peter Buchanan L.D. v. McVey*, [1955] A.C. 516, 524-28 (Ir.H.Ct.1950) (surveying application of the revenue rule by United Kingdom courts), *aff'd*, [1955] A.C. 530 (Ir.S.C.1951); *Government of India v. Taylor*, [1955] A.C. 491, 508 (H.L.) (denying claim of Indian government for unpaid taxes against company in liquidation in Britain because British courts would not enforce Indian revenue laws, stating "[w]e proceed upon the assumption that there is a rule of the common law that our courts will not regard the revenue laws of other countries: it is sometimes, not happily perhaps, called a rule of private international law: it is at least a rule which is enforced with the knowledge that in foreign countries the same rule is observed"); *see also* William S. Dodge, *Antitrust & the Draft Hague Judgments Convention*, 32 Law & Pol'y Int'l Bus. 363, 373 n. 43 (2001) (discussing the application of the revenue rule in both common law and civil law countries); Stoel, *supra* note 2, at 671-74 (discussing the application of the revenue rule in commonwealth countries).

[5] A leading Canadian treatise on the conflict of laws noted:

A. Respect for Sovereignty

Tax laws embody a sovereign's political will. They create property rights and affect each individual's relationship to his or her sovereign. They mirror the moral and social sensibilities of a society. Sales taxes, for example, may enforce political and moral judgments about certain products. Import and export taxes may reflect a country's ideological leanings and the political goals of its commercial relationships with other nations.

In defense of the revenue rule, some courts have observed that the rule prevents foreign sovereigns from asserting their sovereignty within the borders of other nations, thereby

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As evidenced by a more recent decision of the Supreme Court of Canada [*United States v. Harden*, [1963] S.C.R. 366, 371 (Can.)], this judicial doctrine [the revenue rule] is still vigorous in this country in spite of the modern spirit of international co-operation in the field of taxation. In the absence of specific treaty provisions, no matter how conscious and deliberate the tax evasion, there are no judicial or administrative remedies available to the defrauded state or province outside its territorial jurisdiction. J.-G. Castel, *supra* note 2, at 63-64; *see United States v. Harden*, [1963] S.C.R. 366, 371 (Can.) (rejecting the enforcement of a stipulation of settlement of a tax case based on "the special principle that foreign States cannot directly or indirectly enforce their tax claims [in our courts]") (quoting *Government of India v. Taylor*, [1955] A.C. 491, 515 (H.L.)); *Stringam v. Dubois*, [1993] 3 W.W.R. 273, 282-83 (Alta.Ct.App.) (barring claim of estate executor to compel sale of Canadian property because sale proceeds would be used to satisfy American estate taxes); Felix D. Strebel, *The Enforcement of Foreign Judgments & Foreign Public Law*, 21 Loy. L.A. Int'l & Comp. L.J. 55, 75 (1999) (reviewing Canadian cases which hold that "it is a well-established rule of public policy that Canadian law forbids a foreign state from suing, either directly or indirectly, in Canada for taxes alleged to be due to the state").

helping nations maintain their mutual respect and security.[6] *See Sabbatino*, 376 U.S. at 448, 84 S.Ct. 923 (White, J., dis-

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[6] As Lord Denning explained in *Attorney General of New Zealand v. Ortiz*, [1984] A.C. 1 (H.L.):

> [T]he class of laws which will be enforced are those laws which are an exercise by the sovereign government of its sovereign authority over property within its territory or over its subjects wherever they may be. But other laws will not be enforced. By international law every sovereign state has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority.

Id. at 21; *see also Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1165 (9th Cir.1979) ("[I]f the court below was compelled to recognize the tax judgment from a foreign nation, it would have the effect of furthering the governmental interests of a foreign country, something which our courts customarily refuse to do."); *Banco Frances e Brasileiro S.A. v. Doe*, 36 N.Y.2d 592, 601-02, 370 N.Y.S.2d 534, 331 N.E.2d 502 (1975) (Wachtler, J., dissenting) ("Under the principle of territorial supremacy, fundamental to the community of nations, courts refuse to enforce any claim which in their view is a manifestation of a foreign State's sovereign authority."); *QRS 1 APS v. Frandsen*, [1999] 3 All E.R. 289, 294-97 (C.A.) (denying letters rogatory in connection with a tax claim under the revenue rule because "[i]t may be considered that this line of thinking is obsolete, but it still remains anchored within us that we will not permit the presence in our country of foreign tax men, even if represented by intermediaries; we do not tolerate that any help may be given to them" (quoting Professor Mazeaud's commentary on the French court decision *Bemberg v. Fisc de la Provincia de Buenos Aires* (Feb. 24, 1949) (unreported) (internal quotation marks omitted)); *Taylor*, [1955] A.C. at 511 ("[A] claim for taxes is but an extension of the sovereign power which imposed the taxes, and ... an assertion of sovereign authority by one State within the territory of another ... is (treaty or convention apart) contrary to all concepts of independent sovereignties.")); *see also In re Guyana Dev. Corp.*, 201 B.R. 462, 473-74 & n. 4 (Bankr.S.D.Tx.1996) (describing difficulty encountered by estate trustee in obtaining property overseas because foreign countries perceived trustee as IRS surrogate).

senting on other grounds) ("Our courts customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign"); *see generally* F.A. Mann, *Prerogative Rights of Foreign States & the Conflict of Laws, in Studies in International Law*, 492-514 (1973).

Other courts have suggested that it is too sensitive and difficult for courts to determine whether such foreign revenue laws should be enforced by another sovereign. More than seventy years ago, a judge of this court, Learned Hand, offered a rationale in support of the revenue rule that still has resonance today:

> [A] court will not recognize those [liabilities] arising in a foreign state, if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state.... No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir.1929) (L.Hand, J., concurring), *aff'd on other grounds*, 281 U.S. 18, 50 S.Ct. 175, 74 L.Ed. 673 (1930). In part, the reluctance of courts to delve into such matters is based on the "desire to avoid embarrassing another state by scrutinizing its penal and revenue laws." *Sabbatino*, 376 U.S. at 437, 84 S.Ct. 923; *see United States v. Boots*, 80 F.3d 580, 587 (1st Cir.), *cert. denied*, 519 U.S. 905, 117 S.Ct. 263, 136 L.Ed.2d 188 (1996). Similarly, in *Peter Buchanan L.D. v. McVey*, [1955] A.C. 516, 529 (Ir.H.Ct.1950), aff'd, [1955] A.C. 530 (Ir.S.C.1951), relied on by the United States Supreme Court in *Sabbatino*, 376 U.S. at 437-38, 84 S.Ct. 923, the Irish High Court noted that courts had traditionally exercised the right to reject foreign law that

conflicted with the public policy or morality of the domestic court, and stated:

> [M]odern history [is not] without examples of revenue laws used for purposes which would not only affront the strongest feelings of neighbouring communities but would run counter to their political aims and vital interests.... So long as these possibilities exist it would be equally unwise for the courts to permit the enforcement of the revenue claims of foreign States or to attempt to discriminate between those claims which they would and those which they would not enforce. Safety lies only in universal rejection.

The case before us illustrates the point. Canada asserts that the revenue laws at issue were the product of an assessment of its public health priorities. In its complaint, Canada alleged:

> To protect its youth from the health hazards of smoking, and to implement anti-tobacco programs and other public benefits, Canada doubled tobacco duties and taxes in February 1991. Tobacco duty and tax increases, and the resulting higher tobacco prices, held the promise of deterring young people from becoming addicted to a harmful drug. Tobacco duty and tax increases also held the promise of encouraging established smokers to quit.

The tenor of the times, at least among many people in the states of this judicial circuit, is anti-smoking. It is unlikely that enforcing a foreign tax regime aimed at deterring smoking would offend most citizens of New York, Connecticut or Vermont, whatever our personal habits or vices. (Of course, citizens of United States tobacco-growing states might vehemently object to Canada's taxation scheme.) But

consider, for example, other possibilities involving a foreign sovereign's taxes. How would we respond if a foreign sovereign asked us to help enforce a tax designed to render it very expensive to sell United States newspapers in that nation? Or to make the inclusion of United States-made content in machinery built in that foreign country prohibitively expensive? Suppose it were a tax that had been raised to deter the sale of United States pharmaceuticals in that country? Or if a foreign nation imposed an immigration tax on members of a particular religious group or racial minority? It is much less likely that United States citizens would be kindly disposed towards tolerating such taxes, let alone providing judicial resources to enforce them. These hypotheticals – and we do not suggest that they are anything but hypotheticals – demonstrate the sensitive nature of the issues that can be raised through a foreign sovereign's exercise of its taxation powers. *See* Stoel, *supra* note 2, at 678 ("[T]he tax judgments of one nation may be used to attain what other nations consider odious ends...."). Addressing the public policy concerns raised by the imposition of such foreign taxes could embroil United States courts in delicate issues in which they have little expertise or capacity.

We do not suggest that the revenue rule always bars United States courts from furthering the tax policies of foreign sovereigns. This circuit has held the revenue rule "inapplicable" to a United States criminal action premised on violations of foreign tax laws. *United States v. Trapilo*, 130 F.3d 547, 551 (2d Cir.1997), *cert. denied*, 525 U.S. 812, 119 S.Ct. 45, 142 L.Ed.2d 35 (1998); *see also United States v. Pierce*, 224 F.3d 158 (2d Cir.2000). These concerns about sovereignty and extraterritorially are therefore not absolute, and are not implicated in every case involving foreign tax laws. However, as explained below in Section I.B, the particular facts of this case – most notably, the fact that a foreign sovereign plaintiff is directly seeking to enforce its tax laws, and that our government has negotiated and signed a treaty with

this sovereign providing for limited extraterritorial tax enforcement assistance but stopping well short of the assistance requested here – lead us to be wary in this instance of becoming the enforcer of foreign tax policy.

B. Judicial Role and Competence

1. General Principles

Concern about institutional role and competence provides particularly compelling support for the application of the revenue rule in this particular case. Our Constitution provides the framework for interaction and dialogue among the branches of our government.[7] "The conduct of foreign relations is committed largely to the Executive Branch, with power in the Legislative Branch to, inter alia, ratify treaties with foreign sovereigns. The doctrine of separation of powers prohibits the federal courts from excursions into areas committed to the Executive Branch or the Legislative Branch." *In re Austrian and German Holocaust Litig.*, 250 F.3d 156, 163-64 (2d Cir.2001) (per curiam). The legitimacy of our courts depends in no small measure on exercising authority only in those areas entrusted to the courts. "The establishment of political or economic policies is not for the courts. Such action would be an abuse of judicial power." *National City Bank v. Republic of China*, 348 U.S. 356, 371, 75 S.Ct. 423, 99 L.Ed. 389 (1955) (Reed, J., dissenting).[8]

Extraterritorial tax enforcement directly implicates relations between our country and other sovereign nations. When a foreign nation appears as a plaintiff in our courts seeking enforcement of its revenue laws, the judiciary risks being drawn into issues and disputes of foreign relations pol-

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[7] *See generally A Question of Balance: The President, the Congress & Foreign Policy* (Thomas E. Mann ed., 1990); Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (1988).

[8] *See generally* Louis Henkin, *The Courts in Foreign Affairs, in Foreign Affairs & the United States Constitution* 131-48 (2d ed.1996).

icy that are assigned to – and better handled by – the political branches of government.[9] *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) ("The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of ... diplomatic repercussions" caused by the exercise of sensitive political functions that implicate foreign relations.). Again, Judge Hand put it well:

> To pass [judgment] upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities.... Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws.

Moore, 30 F.2d at 604 (L.Hand, J., concurring); *see also* Smith, *supra* note 2, at 257 ("[T]he possibility of a court engendering ill will and hindering the conduct of foreign relations by refusing to enforce a particular tax claim or judgment ... is very real in the international context."); Stoel, *supra* note 2, at 678 ("[A]pplication of forum public policy to revenue laws may be offensive to the plaintiff State and have undesirable foreign relations consequences for the forum State."); *cf. Boots*, 80 F.3d at 587-88 (dismissing a criminal RICO action based on wire and mail fraud in connection with smuggling over the Canadian border on the ground that the action was barred by the revenue rule and the rule's foreign affairs rationale); Alan R. Johnson, *Systems for Tax Enforcement Trea-*

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[9] The role of courts may vary depending on the nature of the foreign policy interest involved. *See* Harold Koh, *The National Security Constitution* 134-49 (1990). Our focus here is on the extraterritorial collection of taxes by a foreign sovereign, where we believe that the arguments for judicial reserve are quite strong.

ties: The Choice Between Administrative Assessments & Court Judgments, 10 Harv. Int'l L.J. 263, 264 (1969) (noting that many commentators dissatisfied with the revenue rule "view executive action by treaty as a preferable means of reform" because of "the supposed foreign relations consequences").

2. The Leading Role of the Political Branches

Indeed, with regard to the domestic collection of foreign taxes and the enforcement of United States taxes abroad, the political branches of our government have consistently acted on behalf of the United States in establishing and managing the nation's relationships with other countries. As this Court stated in 1963:

> The nations of the world have only recently begun to deal with the problem of extra-territorial collection of tax revenues through the medium of negotiated tax treaties providing for mutual cooperation. Absent an explicit indication to the contrary, there should not be attributed to Congress an intent to give the courts of this nation, in this highly sensitive area of intergovernmental relations, the power to affect rights to property wherever located in the world. The apparent necessity of tax treaties underscores the conclusion that Congress has seen fit to handle this problem in another manner.

United States v. First Nat'l City Bank, 321 F.2d 14, 24 (2d Cir.1963) (citation omitted), *rev'd on other grounds*, 379 U.S. 378, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965); *see Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1165 (9th Cir.1979) (considering United States-Canadian tax treaties, and stating "[e]ven though the political branches of the two countries could have abolished the revenue rule between themselves at the time

they entered into the treaties, they did not"). The concerns expressed in *First National City Bank* and *Gilbertson* remain relevant today.[10]

We believe that the political branches of our government have clearly expressed their intention to define and limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws. Thus, that version of the revenue rule under which United States courts abstain from assisting foreign sovereign plaintiffs with extraterritorial tax enforcement is fully consistent with our broader legal, political and institutional framework.

The parties have pointed us to, and we have been able to confirm the existence of, only five countries with which the United States has entered into income tax treaties under which the contracting parties have agreed to provide general assistance in collecting tax judgments.[11] The treaties with

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[10] *See generally* Dennis D. Curtin, *Exchange of Information Under the United States Income Tax Treaties*, 12 Brook. J. Int'l L. 35, 35 (1986) ("There is a generally recognized international principle that one sovereign will not aid another in the enforcement of its revenue laws.... To circumvent the application of this principle, many countries have entered into bilateral income tax treaties."); Stoel, *supra* note 2, at 679 (arguing that foreign relations concerns suggest that it is "preferable that enforcement of foreign-country tax judgments be accomplished by treaty rather than by judicial initiative").

[11] The most recent versions of these treaty provisions are the following: Revised Protocol Amending the Convention With Respect to Taxes on Income and on Capital of September 26, 1980, Mar. 17, 1995, U.S.-Canada, art. 15, S. Treaty Doc. No. 104-4 (entered into force Nov. 9, 1995) [hereinafter Canada-U.S.1995 Protocol]; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, Aug. 19, 1999, U.S.-Denmark, art. 27, S. Treaty Doc. No. 106-12 (entered into force Mar. 31, 2000); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital, Aug. 31, 1994, U.S.-France, art. 28, S. Treaty Doc. No. 103-32 (entered into force Dec. 30, 1995); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, Dec. 18, 1992,

four of these countries – Denmark, France, Sweden and the Netherlands – providing extraterritorial tax collection assistance were first signed and ratified in the late 1930s and 1940s.[12] Relatively soon thereafter, the United States Senate sought to limit the extent to which United States courts and agencies would be obligated to render foreign tax collection assistance. In the words of a member of the Senate Foreign Relations Committee, in 1947 attention was focused on the mutual collection assistance provisions of the treaty with France, and the Committee

> discovered that there had been developed ... a number of objections as to the way by which, under the convention, our country undertook to collect taxes for the government of France. This matter was of such concern that we held a number of hearings [and recommended consultation between individuals, businesses and interest groups concerned about the treaty and State Department representatives]. We discovered that there had been embodied in the

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U.S.-Netherlands, art. 31, S. Treaty Doc. No. 103-6 (entered into force Dec [illegible], 1993); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, Sept. 1, 1994, U.S.-Sweden, art. 27, S. Treaty Doc. No. 103-29 (entered into force Oct. 26, 1995). Apparently, mutual collection assistance provisions are more common in United States estate tax conventions, where different issues are at stake. *See* U.S. Treasury Dep't Technical Explanation, Canada-U.S.1995 Protocol (released June 13, 1995) (discussing art. 15 of the Canada-U.S.1995 Protocol), *available at* 95 Tax Notes Int'l 115-38.

[12] *See* Staff of the Joint Comm. on Internal Revenue Taxation, 1 *Legislative History of United States Tax Conventions* 707, 719 (1962) (U.S.-Denmark convention); *Id.* at 905, 922-23, (U.S.-France conventions); Staff of the Joint Comm. on Internal Revenue Taxation, 2 *Legislative History of United States Tax Conventions* 1890, 1932 (1962) (U.S.-Netherlands convention); *id.* at 2355, 2369-70 (U.S.-Sweden convention). The fifth such treaty, recently negotiated with Canada, is discussed *infra*, Section I.B.3.

> convention certain methods of collection of taxes which we as a subcommittee felt were not desirable, and at our request the whole matter was reviewed again by the State Department representatives.

Staff of the Joint Comm. on Internal Revenue Taxation, 1 *Legislative History of United States Tax Conventions* 1152 (1962) [hereinafter "Legislative History Vol. 1"] (floor statement of Sen. Smith on June 2, 1948). A compromise was embodied in a 1948 Supplementary Protocol, ratified by the full Senate, which provided that collection assistance under the original treaty with France would not be given with respect to taxpayers of the requested state. *See* Supplementary Protocol to the Convention About Double Taxation and Fiscal Assistance, May 17, 1948, U.S.-France, art. I, T.I.A.S. No.1982 (entered into force Oct. 17, 1949), *available at Legislative History Vol. 1*, at 1191.

Next, "in 1951, the Senate considered income tax treaties for Greece, Norway, and South Africa which, as originally submitted to the Senate, would have obligated the treaty countries to provide broad tax collection assistance to each other." Staff of the Joint Comm. on Taxation, 104th Cong., *Explanation of Proposed Protocol to the Income Tax Treaty Between the United States & Canada* 43 n. 52 (Joint Comm. Print 1995) [hereinafter "Taxation Comm. Staff Explanation of Canada U.S. Protocol"]. Specifically, the treaties provided that "finally determined" revenue claims would be accepted for enforcement by the other contracting state and collected as though they were domestic tax claims, but that such assistance would not be accorded with regard to citizens, corporations or other entities of the state to which application for collection assistance was made.[13]

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[13] *See* Convention for Avoidance of Double Taxation and Prevention of Fiscal Evasion With Respect to Taxes On Income, Feb. 20, 1950, U.S.-Greece, art. XIX, T.I.A.S. No. 2902 (entered into force Dec. 30, 1953),

The limitation of collection assistance in these treaties in accordance with the Senate policy of the 1948 U.S.-France protocol was apparently not sufficient. A report was issued by the Senate Foreign Relations Committee concluding that:

> [T]he committee believes that the collection provisions of the South African, Greek, and Norwegian income-tax conventions are too broad, and it repeats that, as a general rule, it is not believed wise to have one government collect the taxes which are due to another government.... Thus, the committee recommends the acceptance of the collection provisions ... subject to the understanding that each of the governments may collect the other's tax solely in order to insure that the exemptions or reduced rates of tax provided under the respective conventions will not be enjoyed by persons not entitled to such benefits.

S. Ex. Rep. No. 1, at 21 (1951), *available at Legislative History Vol. 1*, at 605. A senator who was very involved in the ratification process explained further:

> It is the opinion of the subcommittee and of the whole committee that the [mutual collection assistance provisions are] too broad. As a general rule it is not believed wise to have one government collect the taxes which are due to

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available at Legislative History Vol. 1, at 1419-21; Convention on Double Taxation, June 13, 1949, U.S.-Norway, art. XVII, T.I.A.S. No. 2357 (entered into force Dec. 11, 1951), *available at Legislative History Vol. 2*, at 2114; Convention For the Avoidance of Double Taxation and For Establishing Rules of Reciprocal Administrative Assistance With Respect to Taxes On Income, Dec. 13, 1946, U.S.-South Africa, art. XV, T.I.A.S. No. 2510 (entered into force July 15, 1952), *available at Legislative History Vol. 2*, at 2511; Supplementary Protocol, July 14, 1950, U.S.-South Africa, art. VII, T.I.A.S. No. 2510, a*vailable at Legislative History Vol. 2*, at 2529.

> another government. Therefore the committee recommends that these provisions be eliminated from the pending conventions.... [T]his was the view taken by the committee with respect to all these assistance provisions. It was simply deemed unwise ... to obligate our country to undertake the collection in our own courts of taxes due to the foreign countries dealt with in these conventions. It will be recalled that in many instances, or perhaps all, the courts would be called upon to enforce very harsh civil penalties, and it was not deemed wise for our courts to undertake that particular job.

Legislative History Vol. 1, at 1377 (floor statement of Sen. George on Sept. 17, 1951).

In accordance with these views, "[t]he Senate gave its advice and consent to those treaties subject to an understanding that the countries would only provide such collection assistance as would be necessary to ensure that the exemption or reduced rate of tax granted by the treaties would not be enjoyed by persons not entitled to those benefits." *Taxation Comm. Staff Explanation of Canada U.S. Protocol*, at 43 n. 52 (discussing Sept. 17, 1951 Senate vote); *see generally* Smith, *supra* note 2, at 261-62. This Senate policy was also implemented through an analogous narrowing of the collection assistance provision when the Netherlands tax convention, whose broad collection assistance provisions had been negotiated before the September 17, 1951 Senate vote, *see Legislative History Vol. 2*, at 1667, was extended to cover the Netherlands Antilles. *See id.* at 1678, 1680-82.

In transmitting future tax conventions to the Senate, the State Department often noted that the mutual collection assistance provisions were narrowed to bring them into harmony with the Senate's expressed policy. *See, e.g.*, Letter from Secretary of State John Foster Dulles to the President of

Apr. 18, 1955 (concerning U.S.-Italy convention), *available at Legislative History Vol. 2*, at 1659; Letter from Under Secretary of State Walter B. Smith to the President of June 1, 1953 (concerning U.S.-Australia convention), *available at Legislative History Vol. 1*, at 74-75; Letter from Secretary of State Dean Acheson to the President of Jan. 6, 1953 (concerning U.S.-Belgium convention), *available at Legislative History Vol. 1*, at 258.

This general policy on extraterritorial collection assistance still prevails. For example, the United States Department of Treasury has released the United States Model Income Tax Convention of September 20, 1996 ("1996 Model Convention"). The 1996 Model Convention contains no general provision assisting or allowing the enforcement of foreign tax judgments or claims. Instead, Article 26 of the Convention ("Exchange of Information and Administrative Assistance") provides that "a Contracting State will endeavor to collect on behalf of the other State only those amounts necessary to ensure that any exemption or reduced rate of tax at source granted under the Convention by that other State is not enjoyed by persons not entitled to those benefits." 1996 Model Convention Technical Explanation (2001) (explaining Article 26 ¶4).[14]

Our government's continuing policy preference against enforcing foreign tax laws is further revealed by the fact that in negotiating and ratifying the OECD[15] Convention

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[14] The limited assistance offered in Article 26 of the Model Convention is specifically qualified: "[Paragraph 4] shall not impose upon either of the Contracting States the obligation to carry out administrative measures that would be contrary to its sovereignty, security, or public policy." 1996 Model Convention, Art. 26 ¶ 4.

[15] The Organization for Economic Cooperation and Development ("OECD") was established in Paris in December 1960. *See United States v. A.L. Burbank & Co.*, 525 F.2d 9, 15 (2d Cir.1975). The OECD is an organization which provides its 30 member states "a setting in which to discuss, develop and perfect economic and social policy." OECD Online,

on Mutual Administrative Assistance in Tax Matters, Treaty Doc. 101-6, the executive branch recommended and the Senate adopted a reservation to the treaty's reciprocal collection assistance provisions. *See* Brian J. Arnold, *New Protocol to Canada-U.S. Tax Treaty Addresses Estate Tax Issues, Limitations on Benefits, & Mutual Assistance*, 9 Tax Notes Int'l 859, 862 (1994) ("Although the United States has ratified the OECD Convention ... it reserved its position with respect to the provisions dealing with collections."); 136 Cong. Rec. S13295 (Sept. 18, 1990) (detailing the vote on the reservation); *see also* 136 Cong. Rec. S13294 (statement of Sen. Pell) (Sept. 18, 1990) ("The administration stated, and the Committee on Foreign Relations concurred, that it did not believe it appropriate, at this time, to participate in other aspects of the convention, that is cooperation in tax collection efforts ...."); *see generally Taxation Comm. Staff Explanation of Canada-U.S. Protocol*, at 42-43 (discussing the reservation).

Consistent with this continuing policy, the United States has over the years entered into a number of tax treaties with foreign sovereigns that provide for information exchange and, sometimes, limited collection assistance, but notably fail to make any provision for general enforcement of foreign tax judgments or claims.[16] It seems to us that the usual absence

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What is OECD?, *available at http://www.oecd.org/about/general/index.htm* (last modified Aug. 2, 2001). The United States, Canada, and many of the world's developed, democratic, market-oriented states are members. *See id.* In the realm of international taxation, the OECD's model convention "has almost acquired the status of a multilateral instrument" because of the reliance placed on it by many countries in negotiating bilateral tax conventions. American Law Institute, *International Aspects of United States Income Taxation II: United States Income Tax Treaties 3* (1992).

[16] *See, e.g.*, Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, Jan. 25, 1998, U.S.-Estonia, art. 26, S. Treaty Doc. No. 105-55 (entered into force Dec. 30, 1999); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capi-

in our negotiated tax conventions of any provision for the extraterritorial enforcement of a sovereign's tax judgments or claims cannot be not accidental, but instead must reflect the considered policy of the political branches of our government. Thus, the political branches of our government have clearly expressed their intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws. In this area of foreign relations policy where the political branches have primacy, courts must be wary of intruding in a way that undermines carefully conceived and negotiated policy choices. Accordingly, as a general matter, that version of the revenue rule under which United States courts abstain from assisting foreign sovereign plaintiffs with extraterritorial tax enforcement is fully consistent with our broader legal, diplomatic, and institutional framework.

3. The United States-Canada Treaty Framework

Significantly, we have fairly recently negotiated a tax convention with Canada providing for assistance with the en-

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tal Gains, July 28, 1997, U.S.-Ireland, art. 27, S. Treaty Doc. No. 105-31 (entered into force Dec. 17, 1997); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital, June 17, 1992, U.S.-Russian Fed., art. 25, S. Treaty Doc. No. 102-39 (entered into force Dec. 16, 1993); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, July 11, 1988, U.S.-Indonesia, arts. 26, 29, T.I.A.S. No. 11593 (entered into force Dec. 30, 1990); Agreement for the Exchange of Information With Respect to Taxes, Sept. 27, 1990, U.S.- Honduras, art. 4, T.I.A.S. No. 11745 (entered into force Oct. 11, 1991); Agreement for the Exchange of Information With Respect to Taxes, Feb. 15, 1990, U.S.-Peru, art. 4, T.I.A.S. No. 12060 (entered into force Mar. 31, 1993); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, Sept. 18, 1992, U.S.- Mexico, art. 27, S. Treaty Doc. No. 103-07 (entered into force Dec. 28, 1993); Agreement for the Exchange of Information With Respect to Taxes, Nov. 9, 1989, U.S.-Mexico, art. 4, T.I.A.S. No. 12404 (entered into force Jan. 18, 1990). We note that these tax treaties concern primarily income and capital taxes, rather than customs duties.

forcement of certain fully adjudicated foreign tax judgments. *See* Canada-U.S.1995 Protocol, *supra* note 11, art. 15. Prior to 1995, the U.S.-Canada tax convention was similar with respect to collection assistance to the United States Model Convention and the bilateral income tax treaties negotiated subsequent to the 1951 Senate action. *See Taxation Comm. Staff Explanation of Canada-U.S. Protocol*, at 41 n. 49. The Canada-U.S. treaty prior to 1995 provided for exchange of information between the tax authorities of the contracting states, and also for minimal mutual collection assistance--limited to that assistance necessary to ensure that the exemptions, reduced rates or other benefits provided in the treaty would not be enjoyed by persons not entitled to those benefits. *See Convention With Respect to Taxes on Income and on Capital*, Mar. 28, 1984, U.S.- Canada, arts. XXVI & XXVII, T.I.A.S. No. 11087 (entered into force Aug. 16, 1984); *See also Taxation Comm. Staff Explanation of Canada-U.S. Protocol*, at 41-42.

There are several notable features of the 1995 amendments. First, the expanded mutual collection assistance provision "appl[ies] to all categories of taxes collected by or on behalf of the Government of a Contracting State." Canada-U.S.1995 Protocol, *supra* note 11, art. 15 (adding Article XXVI A, ¶ 9 to the treaty); *See* Taxation Comm. Staff Explanation of Canada-U.S. Protocol, at 41 ("The proposed protocol provides that the countries are to undertake to lend assistance to each other in collecting all categories of taxes collected by or on behalf of the government of each country."). Thus, this treaty provision is intended by both governments to set the parameters for mutual collection assistance with regard to every kind of tax, including the taxes at issue in this case.[17]

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[17] *See* Joseph B. McFarland, *The U.S.-Canada Income Tax Treaty: The Revised Protocol*, 69 Fla. B.J. 62, 64 (July-Aug.1995) (noting that the mutual collection assistance provision covers all taxes including customs and excise taxes).

Second, the 1995 amendments bar assistance with the collection of any revenue claim arising during the time an individual or corporation was a citizen of or incorporated in, respectively, the "requested State." Canada-U.S.1995 Protocol, *supra* note 11, art. 15, ¶ 8. Thus, paragraph 8 bars Canada from asking the United States for collection assistance with regard to a Canadian revenue claim arising when a person was a United States citizen or corporation,[18] which includes many of the defendants and revenue claims in this case.

Third, the 1995 protocol provides that a finally determined revenue claim "may be accepted for collection" by the other sovereign. *Id.*, ¶ 3 (emphasis added). "Paragraph 3 ... clarifies that the Contracting State from which assistance was requested ... has discretion as to whether to accept a particular application for collection assistance." U.S. Treasury Dep't Technical Explanation, Canada-U.S.1995 Protocol (released June 13, 1995) (discussing art. 15 of the 1995 protocol), *available at* 95 Tax Notes Int'l 115-38 [hereinafter "Treasury Technical Explanation"]. Thus, our government has deemed it advisable to allow the executive branch to consider and determine, in each instance, whether a particular Canadian tax liability should be enforced by the United States.

Fourth, the 1995 protocol requires that a state seeking collection assistance certify that the revenue claim has been "finally determined." Canada-U.S.1995 Protocol, *supra* note 11, art. 15, ¶ 2. A claim has been "finally determined" when "the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted." *Id.* Accordingly, the treaty does not abrogate the rule that courts of one nation should not adjudicate the unresolved tax claims of another. That is particularly significant, because in this case Canada is

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[18] *See* Arnold, *supra*, 9 Tax Notes Int'l at 863 (discussing this provision).

not asking for the enforcement of a fully adjudicated Canadian tax judgment, but rather for a United States court to assess and adjudicate the application of Canadian tax laws to the wrongdoing alleged in its complaint.[19]

We do not believe that the United States-Canada treaty (allowing collection of certain fully-adjudicated tax judgments) should be broadly construed to suggest a change in attitude toward the involvement of United States courts in adjudicating foreign tax claims that have not been first reduced to judgment. In fact, allowing assistance with collecting fully-adjudicated judgments was "a departure from U.S. treaty policy of recent years." *Taxation Comm. Staff Explanation of Canada-U.S. Protocol*, at 7. It seems clear that the extent of such policy change is a sensitive question implicating diverse considerations better handled by the political branches. *See Id.* at 43 (noting that in future treaties "consideration may need to be given as to whether it is appropriate for the United States to assist in the collection of another government's taxes. This analysis may involve an evaluation of both the substantive and procedural elements of the other government's taxes, as well as an analysis of broader policy issues, such as the relative compatibility of the other government's legal systems and individual protections with those of the United States."). Before entering the 1995 Canada-U.S. Protocol, our government carefully considered whether and to what extent extraterritorial tax enforcement was advisable:

> [T]he ultimate decision of the U.S. and Canadian negotiators to add the collection assistance article was attributable to the confluence of several unusual factors. Of critical importance was the similarity between the laws of

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[19] Because the United States has negotiated for certain reciprocal assistance with respect to unadjudicated tax claims with at least one other nation, *see* Tax Convention With France, *supra* note 11, art. 28 ¶ 4, the lack of any United States Canada tax treaty with such a provision is telling.

> the United States and Canada. The Internal Revenue Service, the Justice Department, and other U.S. negotiators were reassured by the close similarity of the legal and procedural protections afforded by the Contracting States to their citizens and residents and by the fact that these protections apply to the tax collection procedures used by each State. In addition, the U.S. negotiators were confident, given their extensive experience in working with their Canadian counterparts, that the agreed procedures could be administered appropriately, effectively, and efficiently. Finally, given the close cooperation already developed between the United States and Canada in the exchange of tax information, the U.S. and Canadian negotiators concluded that the potential benefits to both countries of obtaining such assistance would be immediate and substantial and would far outweigh any cost involved.

Treasury Technical Explanation (discussing art. 15). In this area, it is not the courts' role to press ahead further and faster than the political branches have deemed it wise to travel after careful deliberation.

A final aspect of the 1995 protocol we find noteworthy is the provision that the contracting states shall agree "to ensure comparable levels of assistance to each" other with regard to extraterritorial tax collection. Canada-U.S.1995 Protocol, *supra* note 11, art. 15 (adding Article XXVI A, ¶ 11 to the treaty). In other words, both governments have expressed a policy preference for reciprocity in the level of enforcement of each other's tax judgments and claims.[20] *See*

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[20] United States anti-smuggling laws also require reciprocity before allowing American courts to take notice of foreign revenue laws. *See* 18 U.S.C. § 546; 19 U.S.C. §§ 1701-1711. For example, outbound smuggling is

generally Arnold, *supra*, 9 Tax Notes Int'l at 863 (discussing the reciprocity required by the U.S.-Canada treaty). In light of this, the fact that Canada's courts have repeatedly reaffirmed the vitality of the revenue rule, *see supra* note 5, becomes significant. Declining to apply the revenue rule in this case would arguably undermine the considered policy judgment of our political branches.[21] Moreover, it would potentially allow Canada to obtain assistance it has not negotiated for[22] and that would be greater than the assistance our government would likely receive as a litigant in Canada's courts.

In sum, the provisions of the 1995 protocol indicate that the political branches of the two countries intended that the type of taxes involved in this case would be covered by

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banned only to the extent the receiving sovereign has banned similar smuggling into the United States. *See* 18 U.S.C. § 546; *Boots*, 80 F.3d at 588.

[21] *Cf. Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 340 (1st Cir.2000) ("Care should be taken not to impinge on the Executive's treaty-making prerogatives.... The Executive often requires, before extending rights to foreign nations, that there be agreements providing for reciprocal protection of American interests. The ability of the other branches to secure such reciprocity could be undermined if the Judiciary did not adhere to the principal of non-interference.").

[22] We recognize the give-and-take of policy priorities involved in the negotiating of tax treaties and are therefore reluctant to upset the balance negotiated between our two governments. *See generally* Testimony of Leslie B. Samuels, Ass't Sec'y for Tax Policy, U.S. Treasury Dep't, before the Senate Comm. on Foreign Relations, June 13, 1995, *available through* Federal News Service (noting that "[o]btaining the agreement of our [tax] treaty partners ... sometimes requires concessions on our part. Similarly, other countries sometimes must make concessions to obtain our agreement on issues that are critical to them. The give and take that is inherent in the negotiating process leading to a treaty is not unlike the process that results in legislation in [the Senate]."); Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U.J. Int'l L. & Pol. 939, 949 (2000) (describing the "strategic policy choices" involved in the creation of international tax regimes); John F. Avery Jones, *Are Tax Treaties Necessary?*, 53 Tax L.Rev. 1, 3 (1999) (describing how countries use domestic legislative changes to "preserve [their] negotiating position" in international tax treaties).

the treaty's collection assistance provisions, yet negotiated for limitations on collection assistance that specifically exclude the type of assistance Canada seeks in this case. By permitting such a claim to go forward, we would be ignoring and undermining the treaty negotiation process and the clearly expressed views of the political branches of the United States government and instead engaging in *ad hoc* judicial policymaking in the delicate realm of foreign affairs.[23]

4. The Significance of the Identity of the Plaintiff

In *United States v. Boots*, 80 F.3d 580 (1st Cir.), *cert. denied*, 519 U.S. 905, 117 S.Ct. 263, 136 L.Ed.2d 188 (1996), one of the few recent cases dealing with the revenue rule in a similar context, the First Circuit relied in part on similar reasoning to dismiss an indictment for a cross-border smuggling scheme designed to avoid Canadian taxes. *See Id.* at 587 ("[F]or our courts effectively to pass on [foreign revenue] laws raises issues of foreign relations which are assigned to and better handled by the legislative and executive branches of government."), and *Id.* at 587-88 ("Of particular concern is the principle of noninterference by the federal courts in the legislative and executive branches' exercise of their foreign policymaking powers."). This Circuit has disagreed with *Boots* to the extent it applied the revenue rule in a criminal action, s*ee United States v. Trapilo*, 130 F.3d 547, 549 (2d Cir.1997), *cert. denied*, 525 U.S. 812, 119 S.Ct. 45, 142 L.Ed.2d 35 (1998); *United States v. Pierce*, 224 F.3d 158 (2d Cir.2000), but we find the *Boots* reasoning persuasive with respect to the present civil suit. This approach is consistent with our precedent because, with regard to the revenue rule,

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[23] Courts must be cognizant of the limited role they play in formulating policy and the fact that "[i]t is crucial to the efficient execution of the Nation's foreign policy that the Federal Government ... speak with one voice when regulating commercial relations with foreign governments." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 99, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984) (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976)).

there is a critical difference between this civil suit brought by a foreign sovereign and the criminal actions previously considered by panels of this court.[24] In *Trapilo* and *Pierce* (and in *Boots*), the executive branch of the United States brought the case, while here, Canada is the plaintiff. When the United States prosecutes a criminal action, the United States Attorney acts in the interest of the United States, and his or her conduct is subject to the oversight of the executive branch. Thus, the foreign relations interests of the United States may be accommodated throughout the litigation.[25] In contrast, a civil RICO case brought to recover tax revenues by a foreign sovereign to further its own interests, may be, but is not nec-

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[24] Our dissenting colleague characterizes the distinction we make as one between criminal and civil RICO. We, however, distinguish between (criminal) actions prosecuted by the United States, on the one hand, and (civil) actions prosecuted by a foreign sovereign, on the other.

[25] In some cases in which foreign relations matters within the executive's control were involved, courts have allowed litigation to proceed when the executive branch expressed its consent to adjudication by the courts. *See First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768-70, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972) (holding that where "the branch of the government responsible for the conduct of ... foreign relations" has advised the court that adjudication of a case will not "frustrate the conduct of this country's foreign relations," the act-of-state doctrine need not be applied because "[i]t would be wholly illogical to insist that such a rule, fashioned because of fear that adjudication would interfere with the conduct of foreign relations, be applied in the face of an assurance from that branch of the Federal Government that conducts foreign relations that such a result would not obtain"); *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 555-56 (2d Cir.1988), *cert. denied*, 489 U.S. 1081, 109 S.Ct. 1535, 103 L.Ed.2d 840 (1989) (despite lack of formal diplomatic recognition of a foreign sovereign, wholly owned corporation of that foreign government could bring suit in federal courts in light of executive branch's willingness to allow that nation to litigate its contract and tort claims within United States forum). There has been no such expression of consent or approval in the case at bar.

essarily, consistent with the policies and interests of the United States.[26]

Trapilo and *Pierce* are not controlling here. The court in *Trapilo* considered whether the prosecution of a money laundering scheme was barred by the revenue rule, and held that it was not because "[a]t the heart of this indictment is the misuse of the wires in furtherance of a scheme to defraud the Canadian government of tax revenue, not the validity of a foreign sovereign's revenue laws." *Trapilo*, 130 F.3d at 552. In *Pierce*, the court reversed the convictions of two of the *Trapilo* defendants on the ground that the government had failed to establish that the defendants could have deprived anyone of an interest in property when it failed to offer proof of the existence and applicability of Canada's tax laws that the defendants had intended to circumvent.[27] *See Pierce*, 224

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[26] In its brief in opposition to defendant's petition for certiorari in *Pierce v. United States*, the Solicitor General, on behalf of the United States, distinguished between Canada and the United States bringing a case in the United States against cross-border tobacco smuggling:

> This case does not implicate either the revenue rule itself or the rationale on which it is based. It is not an action brought by the government of Canada to enforce a Canadian tax judgment. It is, instead, an action brought by the United States government to enforce its own criminal laws against money laundering and wire fraud committed in this country. Brief for Respondent at 8, *Pierce v. United States*, Nos. 97-1792, 97-8964 (U.S.1997). The United States also stated: "It is thus evident that domestic criminal prosecutions such as this one do not present the concerns that, as explained by Judge Hand in *Moore v. Mitchell*, motivated the adoption of the revenue rule in the different context of civil suits by foreign governments to enforce their own tax judgments." *Id.* at 11.

[27] In *Pierce*, the defendants were "not accused of scheming to defraud the Canadian government of its property, but of its right to obtain property, its right to be paid money." *Pierce*, 224 F.3d at 165. The court assumed that such a right could constitute "property" for the purpose of RICO. *See id.*

F.3d at 167-68. Taken together, these two cases stand for the proposition that a scheme to defraud a foreign nation of its right to impose taxes may be punished under appropriate circumstances by the United States government, in United States courts, using United States penal laws; they do not hold that United States courts, in a civil case, may determine the validity of a foreign tax law or the extent of liability thereunder and award that amount to a foreign sovereign. As we have outlined, the political branches have repeatedly expressed their intention to handle the issue of extraterritorial tax enforcement by a foreign sovereign through the treaty process. This case, unlike *Trapilo* and *Pierce*, involves a request for extraterritorial tax enforcement by a foreign sovereign. The treaty between Canada and the United States confirms that Canada has other, more appropriate, avenues by which to pursue its unadjudicated tax claims – specifically by negotiating for greater assistance with the political branches acting on behalf of the United States.

C. Criticisms of the Revenue Rule

Before considering the interaction between the revenue rule and RICO in this case, we pause to acknowledge the criticism to which the revenue rule has been subject and to consider additional arguments against the rule advanced by Canada in this case.

In academic literature, there is a long history of criticism of the revenue rule as creating improper incentives for moral and commercial conduct. *See*, *e.g.*, Joseph Story,

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at 165-66; *see also Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 317 (7th Cir.1985) (reluctantly allowing a state to pursue a RICO claim based on tax fraud). These decisions predate *Cleveland v. United States*, 531 U.S. 12, 121 S.Ct. 365, 368, 148 L.Ed.2d 221 (2000), in which the Supreme Court held that an unissued video poker license held by the state did not constitute "property" for the purposes of the mail fraud statute. Given that we decide this case based on the revenue rule, it is unnecessary for us to visit the issue of what constitutes "property" under RICO in light of *Cleveland*.

Commentaries on the Conflict of Laws 338-39 (Melville M. Bigelow ed., 8th ed. 1883) (the revenue rule is "inconsistent with good faith and moral duties of nations"); 3 J. Kent, *Commentaries on American Law* 265 (O.W. Holmes, Jr., ed., 12th ed., John M. Gould ed., 14th ed., 1896) (criticizing the broad application of the revenue rule as "laying down an exceedingly lax morality"); *See generally* ALI, *United States Income Tax Treaties*, *supra* note 15, at 122-25 (criticizing the revenue rule and recommending that United States tax treaties allow the enforcement of foreign tax judgments in United States courts). The most recent Restatement of the Law of Foreign Relations states that "[i]n an age when ... instantaneous transfer of assets can be easily arranged, the rationale for not recognizing or enforcing tax judgments is largely obsolete." Restatement (Third) of the Law of Foreign Relations § 483, Reporter's Note 2 (1987) (cited in *Trapilo*, 130 F.3d at 550 n. 4, and *Pierce*, 224 F.3d at 163 n. 3). The analytical underpinnings of the rule have been criticized. *See*, *e.g.*, Stoel, *supra* note 2, at 668-69 (noting that "it is not clear why difficulties in proving or interpreting foreign law would be any greater [with revenue laws] than in other civil suits involving foreign law" and "[i]n any case, the principle of *forum non conveniens*, normally used to take account of these difficulties ... would remain applicable"). Various other criticisms of the revenue rule have been advanced. For example, it has been noted that the early British cases contain scanty reasoning justifying the rule's emergence. Nor did the revenue rule provide the basis of decision in those early British cases. The analogy of revenue enactments to penal laws has been criticized as inconsistent with the modern recognition that the obligation to pay taxes is not penal.[28] While conceding the force of many of these points, we nevertheless decide that, in the specific context of this case – in particular, where

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[28] For a thoughtful discussion of these points, *see European Community v. RJR Nabisco, Inc.*, 150 F.Supp.2d 456 (E.D.N.Y.2001).

the two sovereigns concerned have recognized the vitality of the revenue rule and have a well – established treaty process that has strictly limited the extent to which each government can pursue its tax claims using the other's domestic administrative and judicial processes – the foreign affairs and separation of powers rationales for the revenue have substantial continuing force.

Canada also argues that the revenue rule conflicts with the act-of-state doctrine and therefore should not be applied. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 450 n. 11, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (White, J., dissenting on other grounds) (observing the seeming inconsistency between the act-of-state doctrine and the revenue rule approach to the validity of foreign laws). Under the act-of-state doctrine, a court presumes the validity of a foreign state's laws within that state's territory. *See Galu v. Swissair*, 873 F.2d 650, 653 (2d Cir.1989). In contrast, the revenue rule presumes the extraterritorial unenforceability of a foreign sovereign's tax laws. Defendants contend that the rules are consistent and "represent two different ways in which courts steer clear of foreign affairs in different contexts."

Despite the seeming inconsistency, we believe that defendants have the better argument. In *Sabbatino*, the Supreme Court explained the "constitutional underpinnings" of the act-of-state doctrine:

> It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for it-

> self and for the community of nations as a whole in the international sphere.

Sabbatino, 376 U.S. at 423, 84 S.Ct. 923. The revenue rule appears to share these underpinnings. Under the act-of-state doctrine, the assessment of the validity of a foreign law is limited to its application within the sovereign's territory; under the revenue rule, United States courts avoid the application of a foreign sovereign's tax laws in the United States. Both approaches enable courts to avoid entanglement with questions about the underlying validity of a foreign sovereign's laws.

In sum, as this case demonstrates, sound policy considerations, including international comity, the proper exercise of sovereign powers, institutional competence and separation of powers, and recognition of the U.S.-Canada tax treaty relationship, support the continuing viability and application of the revenue rule to this case.

II. RICO and the Revenue Rule

Canada argues that the revenue rule is not relevant here because it brings this action under a United States statute – civil RICO – rather than under Canadian tax law. Canada challenges the district court's decision dismissing its complaint, stating that

> [the dismissal] violates the fundamental principle that a court must carefully examine a statute's structure, purpose, and policies before applying common law rules to restrict or modify a congressionally created private remedy.... At the time Congress enacted RICO, no court had applied the common law revenue rule to bar a claim of a foreign sovereign to enforce a United States statute.... Congress could not have foreseen that a court later would limit

RICO by extending the common law revenue rule.

Because we find that the revenue rule is a doctrine with continuing force in the particular context of this case, Canada cannot succeed unless it can show that RICO bars the application of the revenue rule. We ultimately conclude that Canada's arguments, though ably made, are unavailing.

Notwithstanding Canada's assertion that Congress was not aware of the broad scope of the revenue rule at the time of RICO's enactment, it is clear that the revenue rule was well established by that date. Therefore, as explained below, Congress is presumed to have legislated with knowledge of the rule. Approximately thirty-five years before RICO's enactment, the United States Supreme Court acknowledged the broad scope of the revenue rule. *See Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 275, 56 S.Ct. 229, 80 L.Ed. 220 (1935).[29] In addition to the authorities cited in Section I, *supra*, numerous courts and commentators professed the vitality of the revenue rule in the years leading up to the enactment of RICO.[30] It was against this

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[29] In *Milwaukee County*, the Supreme Court held that under the Full Faith and Credit Clause each American state must enforce a tax judgment entered in any other state of the union if requested to do so. The Court distinguished the obligations of the states of the union from those of independent foreign sovereigns, which are not bound by the Full Faith and Credit Clause and which are "free to ignore obligations created under the laws or by the judicial proceedings of the others." 296 U.S. at 277, 56 S.Ct. 229.

[30] *See, e.g., Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 293 F.Supp. 892, 913 (S.D.N.Y.1968) (recognizing the revenue rule), modified on other grounds, 433 F.2d 686 (2d Cir.1970); *Newcomb v. Comm. of Internal Revenue*, 23 T.C. 954, 960, 1955 WL 703 (U.S. Tax Ct.1955) ("It is generally recognized that courts as a matter of policy decline to enforce the penal or revenue laws of a foreign jurisdiction."); *Banco Do Brasil, S.A. v. A.C. Israel Commodity Co.*, 12 N.Y.2d 371, 376-77, 239 N.Y.S.2d 872, 190 N.E.2d 235 (1963) (dismissing an action under an American statute brought by foreign government-owned bank to sue for damages allegedly

understanding of the common law that in 1970 Congress enacted RICO.

We do not simply presume congressional awareness of relevant judicial decisions, although we could do so. The Senate itself has, through its actions, shown respect for the revenue rule. *See* Section I.B.2, *supra*.[31]

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caused by violation of Brazilian currency control laws); *De Sayve v. De La Valdene*, 124 N.Y.S.2d 143, 153 (N.Y.Sup.Ct.1953) (referring to "the rule that the courts of one State do not enforce the revenue laws of another"); *Cermak v. Bata Akciova Spolecnost*, 80 N.Y.S.2d 782, 785 (N.Y.Sup.Ct.1948) (same), *aff'd*, 275 A.D. 919, 90 N.Y.S.2d 680 (1st Dep't 1949); *Bowles v. Barde Steel Co.*, 177 Or. 421, 441, 164 P.2d 692 (1945) ("It is held that ordinarily a state court will not enforce the revenue laws of another ... country."); *Hearings Before Sen. Comm. on Foreign Relations, Subcomm. on Double Tax Conventions*, 82nd Cong., 1st Sess., at 69 (1951) (statement of Eldon King, Special Deputy Commissioner, Bureau of Internal Revenue) ("The point that under existing international law and rules of comity, fortified by court decisions, foreign and domestic, the United States cannot collect a tax imposed by a foreign government is readily conceded. Thus, to do so, it is necessary to incorporate collection aid in a treaty."), *available at Legislative History Vol. 1, at 577; Alan R. Johnson, Systems for Tax Enforcement, Treaties: The Choice Between Administrative Assessments & Court Judgments*, 10 Harv. Int'l L.J. 263, 263 (1969) ("Absent special treaty provisions, extraterritorial enforcement [of taxes] remains foreclosed by the venerable, though criticized, doctrine that one nation will not enforce the revenue laws or judgments of another."); Case Note, Canadian Court Will Not Entertain Suit to Enforce United States Tax Judgment, 77 Harv. L.Rev. 1327, 1327 (1964) (referring to "the traditional rule that the courts of one government will not enforce either the penal or the revenue claims of another"); Note, *International Enforcement of Tax Claims*, 50 Colum. L.Rev. 490, 491 (1950) ("[T]he judiciaries of the United States, England, and continental Europe have held that one sovereign state may not maintain an action in the courts of another for the collection of a tax claim."); Note, *Extrastate Enforcement of Penal & Revenue Claims*, 46 Harv. L.Rev. 192, 222 (1932) (discussing revenue rule).

[31] Today, Congress remains alert to the revenue rule. For example, the pending Bankruptcy Reform Act of 2001 provides that the access of foreign creditors to domestic bankruptcy proceedings "does not change or codify present law as to the allowability of foreign revenue claims or other

Principles of statutory construction require that we construe RICO in a manner that preserves the revenue rule absent clear evidence of congressional intent to abrogate it.[32] "[W]here a common-law principle is well established ... the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991) (internal quotation marks and citation omitted). "'Statutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *In re Chateaugay Corp.*, 94 F.3d 772, 779 (2d Cir.1996) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952)). "In such cases, Congress does not write upon a clean slate." *United States v. Texas*, 507 U.S. 529, 534, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993). As discussed above, there can be no question that the version of the revenue rule under which United States courts abstain from assisting foreign sovereign plaintiffs with extraterritorial tax enforcement is a well-established part of the common law and fully consistent with our broader legal, diplomatic, and institutional framework.

"In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Id.*; *See also Id.* at 540-41, 113 S.Ct. 1631 (Stevens, J., dissenting) (disagreeing as to the state of the

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foreign public law claims in a proceeding under [the Bankruptcy Code]." 147 Cong. Rec. S2511 (March 19, 2001) (referring to S. 420).

[32] The dissent focuses principally on whether the justifications for the revenue rule are currently tenable. Although, as discussed *supra*, we believe that they remain so in certain significant respects, that is not the most important issue. Rather, the fundamental question in this case is whether Congress intended to abrogate this long-standing, albeit criticized, common law rule in enacting RICO.

common law, but stating that "[w]e presume that Congress understands the legal terrain in which it operates ... and we therefore expect Congress to state clearly any intent to reshape that terrain"); *Goodkin v. United States*, 773 F.2d 19, 23 (2d Cir.1985) (applying canon and stating that "[t]he no-fault law is a statute in derogation of the common law and, thus, must be strictly construed"). When a statute is as expansive as RICO, a court must be particularly careful to assure itself that Congress intended to abrogate the common law by enacting it. *Cf. Beck v. Prupis*, 529 U.S. 494, 504, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000) ("We presume, therefore, that when Congress established in RICO a civil cause of action ..., it meant to adopt ... well-established common-law civil conspiracy principles."); *Neder v. United States*, 527 U.S. 1, 21-23, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (Court would interpret federal criminal statutes which are common RICO predicate offenses to include common law limitations "unless the statute otherwise dictates" (internal quotation marks omitted)).[33]

Moreover, when an interpretation of a broad, general statute would implicate foreign relations, the Supreme Court has proceeded cautiously and looked for a clear expression of congressional intent as to the statute's scope. For example, in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963), a case about the National Labor Relations Board's assertion of jurisdiction

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[33] *See generally United States v. Bestfoods*, 524 U.S. 51, 62- 63, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998) (Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") cannot be read to abrogate state corporation law unless it speaks directly to the issue, which it does not); *Imbler v. Pachtman*, 424 U.S. 409, 417-18, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (federal civil rights statute did not abrogate general tort immunities; instead, it must be interpreted in light of the immunities); *In re Chateaugay Corp.*, 94 F.3d at 779 (tax intercept statute did not abrogate common law right of setoff).

over foreign seamen, the Court declined to read the National Labor Relations Act in a manner that would raise a serious question of separation of powers, which would in turn implicate sensitive issues of the authority of the executive over relations with foreign nations. It stated that before approving the Board's exercise of jurisdiction "there must be present the affirmative intention of the Congress clearly expressed." *Id.* at 21-22, 83 S.Ct. 671 (citation omitted). Adherence to this principle will ensure that the courts interpret RICO consistently with international law. United States courts "'are not to read general words ... without regard to the limitations customarily observed by nations upon the exercise of their powers.'" *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1047 (2d Cir.1996) (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir.1945)).[34]

Applying these rules of construction, Canada's contention that RICO abrogates the revenue rule fails. "A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989); *See Tome v. United States*, 513 U.S. 150, 163, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995) (plurality opinion) (quoting *Green*). We respectfully conclude that Canada has not carried this burden. The language and structure of RICO and its legislative history offer no hint that Congress intended the statute to afford a civil

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[34] *Cf. Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 124 (2d Cir.), *cert. denied*, 531 U.S. 918, 121 S.Ct. 277, 148 L.Ed.2d 201 (2000) (a treaty will not be deemed to be abrogated unless Congress has made a clear expression that it intends to override its protections); *Maxwell Communication*, 93 F.3d at 1047 ("'[A] statute ought never to be construed to violate the law of nations, if any other possible construction remains.'") (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804) (Marshall, C.J.)).

remedy to foreign nations for the evasion of foreign taxes.[35] Moreover, there is no language in RICO or in its legislative history that demonstrates any intent by Congress to abrogate honored common law principles.[36] For the statute to change such a time-to the matter; yet it does not. Absent such indication, we must presume Congress understood the common law against which it legislated and intended that this common law doctrine should co-exist with the RICO statute.

Legislation passed since RICO's 1970 enactment reinforces our conclusion that Congress did not intend to reach foreign tax law violations and thereby abrogate the revenue rule through civil RICO. In 1978, Congress outlawed trafficking in contraband cigarettes with the aim of reducing evasion of state cigarette taxes, and amended RICO to include such trafficking as a predicate offense. *See* 18 U.S.C. §§ 1961(1)(B), 2341-2346. Although Congress knew that the "purchase of cigarettes through tax-free outlets include[d] cigarettes obtained from three primary sources: international points of entry, military post exchanges, and Indian reservations," S. Rep. 95-962, at *6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5518, 5520, and that "[t]here [was] widespread traffic in cigarettes moving in or otherwise affecting interstate or foreign commerce," H.R. Conf. Rep. 95-1778, at *7

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[35] Congress could have chosen to afford a remedy for this conduct with RICO, had it so desired. At the time of RICO's passage, it was well known that organized crime organizations engaged in tax evasion and smuggling. *See, e.g.*, Thomas Svogun, *Cigarette Bootlegging: The Problem, Civil & Criminal Remedies*, in 1 Materials on RICO 241, 245-54 (G. Robert Blakey ed., 1980) (describing reports of cigarette smuggling in 1960s and 1970s).

[36] Neither the parties nor the dissent have cited, and our research has not revealed, any statements about the revenue rule in RICO's extensive legislative record. *Cf. Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 317 (7th Cir.1985) (noting that RICO's legislative history is "silent" on whether a state department of revenue can use RICO to punish tax evasion).

(1978), *reprinted in* 1978 U.S.C.C.A.N. 5535, 5536, Congress did not prohibit smuggling between countries or in violation of foreign tax laws. *See* 18 U.S.C. §§ 2341(2), (4).

We are aware that RICO is a broad statute, and that the Supreme Court has often rejected attempts to limit the reach of its provisions through judicially-created narrowing constructions. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) ("'[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'") (citation omitted). One key difference in the instant case is that we are emphatically *not* dealing here with a situation "not ... anticipated by Congress." As we have demonstrated, Congress was and is aware of the revenue rule, the precise extent of extraterritorial enforcement assistance available under our tax treaties, and the existence of cigarette smuggling in violation of foreign tax laws. In spite of the extensive Congressional attention to these areas, we are not cognizant of any manifestation of Congressional intent that civil RICO and the United States courts should be available to a foreign sovereign seeking to recover lost tax revenues.

III. Direct and Indirect Enforcement under the Revenue Rule

As an initial matter, we note again that Canada is not asking for the enforcement of a final, fully adjudicated Canadian tax judgment, but rather, for a United States court to assess and adjudicate the application of Canadian tax laws to the wrongdoing alleged in its complaint. When presented with such a request which potentially implicates the revenue rule, a court must examine whether the substance of the claim is, either directly or indirectly, one for tax revenues.[37] What

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[37] *See Banco Frances e Brasileiro S.A. v. Doe*, 36 N.Y.2d 592, 601-02, 370 N.Y.S.2d 534, 331 N.E.2d 502 (1975) (Wachtler, J., dissenting) ("Accordingly, the result is not determined by the threshold appearance of the

matters is not the form of the action, but the substance of the claim.[38] For example, in *United States v. Harden*, [1963]

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particular law sought to be enforced is whether such law be denominated by the foreign government as a penal law or revenue law or otherwise. The bottom line is that the courts of one country will not enforce the laws adopted by another country in the exercise of its sovereign capacity for the purpose of fiscal regulation and management."); *see generally* F.A. Mann, *Prerogative Rights of Foreign States & the Conflict of Laws, in Studies in International Law* 502 (1973) ("It is equally certain that in ... matters [of prerogative rights] the court will not allow itself to be misled by appearances: on the contrary, it will investigate whether what the plaintiff asserts is in substance a prerogative right the direct or indirect enforcement of which is being sought.").

[38] In *Peter Buchanan*, the Irish High Court explained: Those cases on penalties would seem to establish that it is not the form of the action ... that must be considered, but the substance of the right sought to be enforced; and that if the enforcement of such right would even indirectly involve the execution of the penal law of another State, then the claim must be refused. I cannot see why the same rule should not prevail where it appears that the enforcement of the right claimed would indirectly involve the execution of the revenue law of another State, and serve a revenue demand.... In each case it is sought to enforce a personal right, but as that right is being enforced at the instigation of a foreign authority, and would indirectly serve claims of that foreign authority of such a nature as are not enforceable in the courts of this country, relief cannot be given.

Peter Buchanan L.D. v. McVey, [1955] A.C. 516, 527 (Ir.H.Ct.1950), aff'd, [1955] A.C. 530 (Ir.S.C.1951); *see Sydney Municipal Counsel v. Bull*, [1909] 1 K.B. 7, 12 (quoted in *Peter Buchanan*, [1955] A.C. at 525) ("Some limit must be placed upon the available means of enforcing the sumptuary laws enacted by foreign States for their own municipal purposes.... The action is in the nature of an action for a penalty to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has always been held that an action will not lie outside the confines of the last-mentioned State."); *QRS 1 APS v. Frandsen*, [1999] 3 All E.R. 289, 291 (C.A.) ("It is a fundamental principle of English law that our courts will not directly or indirectly enforce the penal, revenue or other public laws of another country. On the English authorities it is clear that the present action falls foul of that rule: in substance it involves the indirect enforcement of Denmark's revenue law." (internal citation omitted)).

S.C.R. 366, 371 (Can.), the Canadian Supreme Court rejected the enforcement of a stipulation of settlement of a tax case as barred by the revenue rule, stating that "[n]either the foreign judgment nor the agreement does more than make certain the fact and the amount of the respondent's liability to the appellant. The nature of the liability is not altered. It is a liability to pay income tax." The Court concluded: "'For the purpose of this case it is sufficient to say that when it appears to the court that the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction.'" *Id.* at 372-73 (quoting *Peter Buchanan*, [1955] A.C. at 529).

Canada argues to this Court that "[n]othing in the revenue rule, ... prohibits a foreign nation from bringing a suit in the United States to enforce rights established *under United States law*. This is not an attempt by Canada to assert its sovereignty extraterritorially; it is not a claim to enforce Canadian tax law or any other Canadian law." We are not persuaded by Canada's arguments that this is an action brought solely under United States law, and not a claim for Canadian taxes. On the contrary, Canada seeks to use the United States law to enforce, both directly and indirectly, its tax laws.[39]

As to direct enforcement, Canada alleges that "[d]efendants evaded the payment of customs and excise tax and duty owed directly to Canada. This evasion was a direct cause of lost revenue to Canada.... Defendants' conduct forced Canada to roll back tobacco taxes in 1994, resulting in lost revenue into the future." As the Canadian Supreme Court

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[39] In any event, we do not understand how a formalistic distinction between an action based explicitly and entirely on Canadian law and one which, in effect, pleads violations of Canadian law through the medium of a United States statute, is a response to the concerns outlined above about, *inter alia*, judicial non-interference with international tax policy-making by the political branches.

said in *Harden*, we must look to the "object" of the claim. When we do so, we see that, at bottom, Canada would have a United States court require defendants to reimburse Canada for its unpaid taxes, plus a significant penalty due to RICO's treble damages provision. Thus, Canada's object is clearly to recover allegedly unpaid taxes.

We also conclude that Canada's claim for damages based on law enforcement costs is in essence an indirect attempt to have a United States court enforce Canadian revenue laws, an exercise barred by the revenue rule. *See* 1 Dicey & Morris, *The Conflict of Laws* 91 (13th ed. 2000) ("Indirect enforcement occurs where a foreign State (or its nominee) in form seeks a remedy, not based on the foreign rule in question, but which in substance is designed to give it extra- territorial effect...."). As to law enforcement costs, Canada states:

> Defendants' role in smuggling caused Canada to increase enforcement and investigative resources. But for Defendants' active involvement in smuggling, Canada would not have had to dedicate as many resources to combat smuggling. The predictable outcome of Defendants' evasion of United States and Canadian laws, and concealment of such evasion, was to cause Canada to spend further resources attempting to discover the culprits of its injury.

Canada attempts to analogize its injury of additional law enforcement costs incurred to the harms suffered by private victims of RICO schemes: "Canada incurred specific additional law enforcement costs not as part of its normal policing, but in self-defense because it was under direct attack by defendants.... No different result should obtain merely because the RICO scheme was more ambitious and the intended victim was a sovereign nation that was forced to combat the illegal conduct with special enforcement resources."

We disagree. The primary purpose identified by Canada for using its police forces to stop the smuggling was to enforce its customs and excise taxes. In effect, Canada is requesting that defendants pay the salary of the tax enforcers; such police costs are thus derivative of the taxes Canada sought to enforce. We do not believe that the mechanism for the enforcement of a tax law can be so easily separated from the tax law itself. It would certainly be anomalous for the Court to permit the collection of the law enforcement costs while holding that the object of those law enforcement efforts was uncollectable. Particularly in light of the separation of powers and foreign relations concerns discussed above, we must decline to allow Canada to indirectly enforce its revenue laws simply by pleading tort damages based on the costs of enforcing those laws.

Canada's argument depends on the contention that the expenditure of resources by a private individual can be equated with the expenditures of a nation.[40] By their very nature, sovereigns, unlike individuals, have at their disposal state-funded and state-maintained resources – such as the ser-

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[40] The district court held that the law enforcement costs were barred under *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 104 (1990), which stated in dicta that a government's additional law enforcement costs were not recoverable under RICO. *See Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc.*, 103 F.Supp.2d 134, 151-55 (N.D.N.Y.2000); *see generally* Anne Giddings Kimball & Sarah L. Olson, *Municipal Firearm Litigation: Ill Conceived from Any Angle*, 32 Conn. L.Rev. 1277, 1296-1301 (2000) (describing the municipal cost recovery rule which precludes government's recovery in a civil action for the cost of public services); *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F.Supp.2d 882, 894-95 (E.D.Pa.2000) (same). Canada distinguishes the present case from *Town of West Hartford* on the ground that in this case, Canada was the intended victim of defendants' scheme, while in *Town of West Hartford*, the town was not the defendants' target, but instead used its police to aid the abortion clinic that was the defendants' target. We need not address this issue on appeal, and do not decide whether, under different circumstances, such costs would be available to a government that was the intended victim of a RICO scheme.

vices of the Canadian Attorney General and the Royal Canadian Mounted Police – to combat a RICO scheme. The sovereign has a legal monopoly on the use of this type of coercive power. *See generally* Max Weber, *The Theory of Social & Economic Organization* 156 (Talcott Parsons ed., 1947). Law enforcement costs incurred to secure taxes for the sovereign are qualitatively different from the damages suffered by a private individual; they fall within the class of acts that are "*jure imperii*," that is, that are expressions of a foreign sovereign's will or are carried out by virtue of that sovereign authority. *See Attorney General of New Zealand v. Ortiz*, [1984] A.C. 1, 20-21 (H.L.). United States courts have traditionally been reluctant to enforce foreign laws that are "*jure imperii*."[41]

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[41] Under international law, a sovereign's acts may be classified in two groups. "One class comprises those acts which are done by a sovereign 'jure imperii,' that is, by virtue of his sovereign authority. The others are those which are done by him 'jure gestionis,' that is, which obtain their validity by virtue of his performance of them." *Ortiz*, [1984] A.C. at 20-21; *see Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) (noting that under the restrictive theory of absolute immunity, "a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*)"); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976) (same). An example of a private, "*jure gestionis*" act is operating a business. In addition to the enforcement of revenue laws, a classic example of "*jure imperii*" acts is the enforcement of penal laws. *See Nelson*, 507 U.S. at 361, 113 S.Ct. 1471 ("a foreign state's exercise of the power of its police has long been understood ... as particularly sovereign in nature"). As with revenue rules, American courts have generally refrained from enforcing the penal laws of foreign sovereigns. *See Huntington v. Attrill*, 146 U.S. 657, 673-74, 13 S.Ct. 224, 36 L.Ed. 1123 (1892) ("The question whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."); *The Antelope*, 23 U.S. (10 Wheat.) 66, 123, 6 L.Ed. 268 (1825)

Additional considerations reinforce our determination that Canada's claim for law enforcement costs must be dismissed. To proceed with the law enforcement costs claim, we would have to examine the tax laws at issue in order to assess the causation aspect of this claim. For example, we would have to assess whether the law enforcement costs were in fact spent on achieving the cessation of cigarette smuggling. So doing, we would have to examine whether, when and to what extent the smuggling existed, which would require a determination that tax laws were applicable to defendants. These inquiries could draw the courts into troubled waters.

Canada emphasizes that recent thinking with regard to the revenue rule has admitted a distinction between the "enforcement" and the "recognition" of revenue laws, and argues that it seeks only recognition, not enforcement, of its laws. In particular, Canada asserts that the revenue rule may prohibit the enforcement of Canadian tax laws, but not their recognition in order to calculate damages. *See* 1 Dicey & Morris at 90 (revenue rule "relates only to *enforcement*, but it does not prevent *recognition* of a foreign [revenue] law.") (emphasis in original). Canada relies on two pairs of cases to support this position. First, Canada draws a parallel between the present case and those in which United States courts calculating sentences have considered foreign sovereigns' lost tax duties as a measure of damages caused by criminal activity. *See, e.g., United States v. Chmielewski*, 218 F.3d 840, 843 (8th Cir.2000). This argument is unavailing. As explained above, *See* Section I.B.4, *supra*, criminal cases do not raise the same issues as those implicated by the instant civil suit by Canada.

Second, Canada cites in *In re State of Norway's Application (Nos. 1 and 2)*, [1990] A.C. 723, 724 (H.L.), in

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(Marshall, C.J.) ("The Courts of no country execute the penal laws of another ..."). Thus, the bar on the extra-national enforcement of revenue laws is just one aspect of a cautionary approach of domestic courts to enforcing foreign laws that are "*jure imperii*."

which an English court held that the revenue rule did not bar an application by Norway to gather evidence in England for use in tax proceedings in Norway, and *Regazzoni v. K.C. Sethia (1944) Ltd.*, [1956] 2 Q.B. 490, 515-16 (C.A.), *aff'd*, [1957] 3 All E.R. 287 (H.L.), where an English court held that the rule against enforcing foreign political laws did not require it to enforce a contract that violated Indian laws against export to South Africa.[42] In both of these cases, the court permitted recognition but not enforcement of foreign revenue laws. However, in neither *Norway* nor *K.C. Sethia* was the British court called upon to allow damages that would serve as a substitute for previously unpaid taxes to be paid in the United Kingdom to a foreign sovereign. Moreover, in the *K.C. Sethia* case, a foreign sovereign did not come to Britain for relief; rather, private parties sought the court's assistance to resolve a commercial dispute, as the House of Lords noted when Viscount Simonds stated that "in consideration of this

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[42] Lord Denning explained:

> These courts will not enforce [revenue or penal] laws at the instance of a foreign country. It is quite another matter to say that we will take no notice of them. It seems to me that we should take notice of the laws of a friendly country, even if they are revenue laws or penal laws or political laws, ... at least to this extent, that if two people knowingly agree to break the laws of a friendly country or to procure some one else to break them or assist them in the doing of it, then they cannot ask this court to give its aid to the enforcement of their agreement. *K.C. Sethia*, [1956] 2 Q.B. at 515. We note that the *K.C. Sethia* case involved a political law, not a revenue law, and thus presented different considerations than the present case does. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 414 & n. 16, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (noting that doctrine against applying public laws other than revenue and penal laws "may have a broader reach in Great Britain" than in the United States).

matter I deem it of the utmost importance to bear in mind that we are not here concerned with a suit by a foreign state to enforce its laws." *K.C. Sethia*, [1957] 3 All E.R. at 289.[43] In the present case, the taxes would be enforced by a United States court if Canada were successful. Similarly, in *In re Reid*, [1970] D.L.R.3d 199, 205 (B.C.Ct.App.), the Canadian court relied on the distinction between recognition and enforcement when it allowed the trustee of an estate to be indemnified for having paid a foreign tax claim out of the estate, stating:

> In every one of the cases ... referred to, success would have enriched the treasury of the interested State. In the case at bar, whether or not the trustee is indemnified cannot affect to the slightest degree the amount of estate duty collected in England.... Here the United Kingdom has nothing whatever to do with the respondent's claim to be indemnified.

Accordingly, the cases cited by Canada are inapposite and do not undermine our conclusion that all of Canada's claims are barred by the revenue rule.

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[43] It seems clear the House of Lords recognized a difference between enforcement by a foreign sovereign as compared to private claims brought by individuals affected by tax laws, as Lord Denning stated in *K.C. Sethia*:

> It seems to me that Lord Mansfield [in *Holman v. Johnson*] goes too far when he says that these courts will take no notice of such [penal or revenue] laws. It is perfectly true that the courts of this country will not enforce the revenue laws or the criminal laws of another country at the suit of that country, either directly or indirectly. These courts do not sit to collect taxes for another country or to inflict punishments for it.... These courts will not enforce such laws at the instance of the foreign country. *K.C. Sethia*, [1956] 2 Q.B. at 515.

Conclusion

To the extent that the allegations set forth in Canada's complaint are correct, we understand Canada's frustration that it cannot recoup its lost revenue and law enforcement costs against defendants that allegedly committed most of their wrongdoing on our side of the common border with Canada. No court wishes to find itself in the position of being unable to right an alleged wrong. *See Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111, 120 N.E. 198 (1918) (Cardozo, J.). Nonetheless, we are without license to abandon unilaterally the centuries-old, albeit sharply-attacked, revenue rule. "The hard fact is that sometimes we must make decisions we do not like" because the laws "compel the result." *Texas v. Johnson*, 491 U.S. 397, 420- 21, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (Kennedy, J., concurring). "When and if the [revenue] rule is changed, it is a more proper function of the policy-making branches of our government to make such a change." *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1166 (9th Cir.1979). Recourse, to the degree it is warranted and available, lies with the executive and legislature.

Because the judgment is affirmed based on the revenue rule, we need not address the other grounds discussed by the district court or raised by the parties on appeal.[44]

CALABRESI, Circuit Judge (dissenting).

On its face, and despite the considerable confusion created by defendants' able arguments, the revenue rule has nothing to do with this case. As described by the relevant Restatement, the rule provides only that "[c]ourts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states." Restatement (Third) of Foreign Rela-

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[44] We express our appreciation for the excellent submissions made by the parties and *amici curiae*.

tions Law § 483 (1987). The majority describes the rule in a similar fashion: "The revenue rule is a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns." Majority Op. at 109. It is manifest that the suit before us in no way requires our courts to enforce foreign judgments or claims; it simply is an action for damages provided for and brought under federal law. Nevertheless, the majority invokes the revenue rule to bar the suit. Because I do not think the rule applies and because none of the possible rationales for the rule supports its extension to the facts in this case, I respectfully dissent.

The majority's description of Canada's suit makes clear that this action arises from a violation of a United States statute, namely the civil enforcement provision of RICO, 18 U.S.C. § 1964(c), which itself creates the cause of action. "Canada alleges that defendants violated RICO by ... repeated instances of mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1962(c). Second, Canada alleges a conspiracy, in violation of 18 U.S.C. § 1962(d), to violate subsections (a), (b) and (c) of section 1962." Majority Op. at 107-08 (footnote omitted). The Canadian tax laws come into play only indirectly, as a factor to be used in the calculation of damages, and do so entirely because the RICO statute itself makes the Canadian laws relevant to that calculation. Thus RICO states that, in the calculation of damages, "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit...." 18 U.S.C. § 1964(c). It follows that Canada, in suing for damages resulting from the violation of a United States statute, neither is seeking to have non-Canadian courts enforce Canadian judgments, laws, or policies, nor is basing this action on the violation of the Canadian statute.

Undaunted by this fact, the majority seeks to justify its position by undertaking an extended examination of the supposed functions served by the revenue rule, with the result that the rule is greatly expanded in its scope, and, indeed, would seemingly be applicable whenever a foreign country seeks to recover government funds.[1] But in fact, the functions of the revenue rule either are not served at all by foreclosing this action or are furthered in ways that this Circuit has already held do not justify application of the revenue rule. *See United States v. Pierce*, 224 F.3d 158, 167 (2d Cir.2000); *United States v. Trapilo*, 130 F.3d 547, 552-53 (2d Cir.1997).

The majority cites three major bases for the revenue rule, each of which I shall examine in the context of the case before us.

I

The first argument has to do with a reluctance to permit, much less promote, extraterritorial effect of foreign laws. In this view, the revenue rule acts as a bar against the assertion of foreign sovereignty within domestic borders. This position probably represents the original basis for the rule.[2] It is also the rationale given by Justice White dissenting in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), in which he explained that "no country has an obligation to further the governmental interests of a foreign sovereign." *Id.* at 448, 84 S.Ct. 923.

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[1] The majority appears to accept the district court's conclusion that Canada has standing to bring a civil RICO suit. Given that the result of such a suit would be money damages, which would provide income for the foreign government, one wonders whether, under the majority's reasoning, any suit brought by Canada would be permissible under the revenue rule. And yet, if Congress intended Canada to have standing to bring a civil RICO suit, then it must not have understood the revenue rule to bar all such actions.

[2] *See* Majority Op. at 111-12.

I have no argument with Justice White, and agree (a) that no country has this obligation and (b) that the determination of such an obligation (should this country desire to advance foreign interests) is not for the courts but for the legislative and executive branches. This concern for extraterritoriality, however, has no meaning whatever when what is enforced by imposing damages or penalties is, in fact, a domestic law, that is, a law enacted by the legislative and executive branches of our country.[3] And, what Canada alleges in this suit is a violation of the RICO statute.

As a court, we have no obligation to further Canada's sovereign interests. But we do have an obligation to further America's sovereign interests. That is, we are bound to entertain suits brought under federal statutes, and to award the damages that such statutes establish. In enacting RICO and its civil enforcement provision, Congress chose to create this action. It follows that, by enacting RICO, our government has determined that this suit advances *our own* interests, and any collateral effect furthering the governmental interests of a foreign sovereign is, therefore, necessarily incidental. *See Trapilo*, 130 F.3d at 553 ("Whether our decision today indirectly assists our Canadian neighbors in keeping smugglers at bay or assists them in the collections of taxes, is not our Court's concern.")

II

The majority's second argument supporting the rule relates to separation of powers, foreign policy, and court competency concerns. It focuses on the idea that enforcement of particular foreign laws by American courts may not reflect United States policy – and, in any event, does not represent that policy as formulated by an appropriate branch of gov-

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[3] It is unlikely that the rationale applies even when the domestic law is a domestic common law rule – i.e. state common law fraud. It certainly does not apply when the domestic law being enforced by our courts is both statutory and federal.

ernment. But this concern is once again misplaced whenever the legislative and executive branches have created the cause of action. Under the circumstances, the courts cannot be said to be formulating foreign policy, they are simply implementing the policy established by the other branches.

An analogy to the enforcement of foreign judgments is apt. Generally speaking, foreign judgments are not directly enforceable in United States courts because of foreign policy and separation of powers concerns. *See, e.g., Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir.1929) (Hand, J., concurring). But, the moment treaties or laws are enacted that provide for the enforcement of certain foreign judgments, the situation changes. United States courts can thereafter enforce these judgments and must do so regardless of whether our foreign policy favors or disfavors the specific judgment before the court. Similarly, though foreign tax laws cannot be enforced directly, when American law renders an activity – including the violations of foreign tax laws – an American tort or crime, the issues of whether our foreign policy favors or disfavors the particular form of taxation involved or the choice of items to be taxed must disappear. As the Supreme Court has explained, the purpose of civil RICO is "not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella v. Wood*, 528 U.S. 549, 557, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000). "The aim is to divest the association of the fruits of its ill-gotten gains." *United States v. Turkette*, 452 U.S. 576, 585, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). To reject the application of civil RICO to the case at hand is to hamper this congressional objective.

III

The third argument relied on by the majority is, to my way of thinking, the only one that is at all germane. It was suggested by Judge Learned Hand in *Moore*, 30 F.2d at 604, and is based on the alleged difficulty involved in figuring out the meaning and significance of some foreign laws – espe-

cially foreign tax laws. As such, it is directly relevant to this suit, given the fact that, in the instant case, the damages to be assessed under RICO are to be calculated on the basis of the revenue that Canada has lost.

This rationale suggests that we should try to avoid determining the degree to which certain foreign laws have been violated. And, in this view, statutory interpretation of foreign laws is beyond the purview of the courts of this country not because such interpretation involves extraterritoriality or because it infringes on the domain of other governmental bodies, but for the pragmatic reason that it is very complicated. This concern, in other words, suggests a practical obstacle to the suit before us because the suit, to calculate damages, requires just such an analysis. *Cf. Id.*

Whatever the possible merits of this argument,[4] this Circuit has rejected it. At least that is the lesson that I draw from *United States v. Trapilo*, 130 F.3d 547 (2d Cir.1997), and *United States v. Pierce*, 224 F.3d 158 (2d Cir.2000). *Trapilo* presented the question of whether a scheme (essentially identical to the one before us) to defraud the Canadian government of tax revenue is cognizable under the federal

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[4] The argument is, to put it mildly, dubious in a global economy, which requires a great amount of interpretation of foreign laws. *E.g., Trapilo*, 130 F.3d at 550 n. 4 ("In an age when virtually all states impose and collect taxes and when instantaneous transfer of assets can be easily arranged, the rationale for not recognizing or enforcing tax judgments is largely obsolete." (quoting Restatement § 483)); *Banco Frances e Brasileiro S.A. v. Doe*, 36 N.Y.2d 592, 370 N.Y.S.2d 534, 538, 331 N.E.2d 502 (1975) (commenting that "much doubt has been expressed that the reasons advanced for the rule, if ever valid, remain so ... in light of the economic interdependence of all nations ....") *cert. denied*, 423 U.S. 867, 96 S.Ct. 129, 46 L.Ed.2d 96 (1975). *See also* Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 Am. J. Comp. L. 581, 586 (1995) (decrying the reluctance of federal courts to interpret foreign law in a global economy and stating that "federal courts have shown a commendable ability to get their hands around foreign law when fully briefed on the issues").

wire fraud statute, 18 U.S.C. § 1343. *Trapilo*, 130 F.3d at 548. We there held that "[t]he statute neither expressly, nor impliedly, precludes the prosecution of a scheme to defraud a foreign government of tax revenue, and the common law revenue rule, inapplicable to the instant case, provides no justification for departing from the plain meaning of the statute." *Id.* at 551. But in *Trapilo*, because the statute prohibited schemes to defraud regardless of their success, we assumed that we could find a violation without delving into the intricacies of Canadian law. *Id.* at 552-53. As a result, we avoided confronting Judge Hand's concerns.

In *Pierce*, however, a case involving essentially the same question, we addressed those concerns and necessarily rejected them. The *Pierce* court held that "[t]o prove the existence of a scheme to defraud the Canadian government the prosecution had to prove the existence of [the property] right." *Pierce*, 224 F.3d at 165. That is, the court held that the prosecution had to prove the existence of a duty imposed by the Canadian government so that there would be a "property right – a right to revenue – of which the Canadian government could be defrauded." *Id.* at 166. What is more, if a conviction is obtained – as *Pierce* clearly allows – the sentencing guidelines require that the sentence imposed be based on the amount of tax revenue lost.[5] In other words, the guidelines make necessary precisely the same degree of involvement with, and interpretation of, Canadian law that the case before us entails. *Pierce*, *Trapilo*, and the guidelines mandate this degree of involvement in order to determine the existence of a RICO crime and the proper sentence for that crime (i.e., the criminal penalty). The instant case does so in order to de-

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[5] Under the sentencing guidelines, the offense level will usually be determined by the offense level of the underlying conduct. U.S.S.G. § 2E1.1. If, as here, the underlying conduct is wire fraud, the offense level increases based on the amount of money lost. U.S.S.G. § 2F1.1.

termine the existence of a RICO civil action and to calculate the proper damages under that action (i.e., the civil penalty).

As a result, I must conclude that the rationale for the revenue rule that is based on the desire to avoid analysis of foreign statutes has been effectively rejected by our court. *Trapilo* permitted a criminal charge to be brought for the very same underlying behavior as is involved in the case before us. *Pierce* required that we know in detail the nature of the foreign tax laws to make out that criminal charge. And, the sentencing guidelines make necessary that, after a conviction for actions like those charged here, the amount of revenue lost be calculated. If American courts can look to and examine the foreign statute for criminal RICO purposes, there is no reason why the same courts must be deemed incompetent to undertake an identical analysis in civil RICO cases. It follows that the majority's third rationale for the revenue rule cannot, at least in this Circuit, provide support for applying the rule to this case.

In light of *Pierce* and *Trapilo*, the majority, understandably, tries to assert differences between civil and criminal RICO actions. But this approach founders in the face of the Supreme Court's consistent refusal to treat criminal and civil RICO actions differently.[6] It also fails because there is

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[6] The Court made clear that it would not interpret civil RICO narrowly in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). The Court noted that its broad interpretation of civil RICO "is amply supported by our prior cases and the general principles surrounding the statute.... This is the lesson not only of Congress's self-consciously expansive language and overall approach, ... but also of its express admonition that RICO is to 'be literally construed to effectuate its remedial purposes.'" *Id.* at 497-98, 105 S.Ct. 3275 (citation omitted) (quoting Pub.L. 91-452 § 904(a), 84 Stat. 947). The Court further explained: "The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity.... RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime.... While few of the legislative statements about novel remedies and attacking crime on all fronts ... were made with

no basis in the revenue rule itself for treating criminal and civil cases differently.

Surprisingly, in trying to make a distinction between civil and criminal RICO cases, for revenue rule purposes, the majority states that it finds the First Circuit's reasoning in *United States v. Boots*, 80 F.3d 580 (1996) "persuasive with respect to the present civil suit." Majority Op. at 123. But in *Boots*, the First Circuit held that the revenue rule barred a *criminal* action involving deprivation of the tax revenue of a foreign nation. And, in its holding, the *Boots* court derided the civil-criminal distinction (purportedly based on the existence of prosecutorial discretion) that the majority seeks to use in this case. The *Boots* court noted that "[p]rosecutors, who operate within the executive branch, might of course be expected not to pursue wire fraud prosecutions based on smuggling schemes aimed at blatantly hostile countries, but whether conduct is criminal cannot be a determination left solely to prosecutorial discretion." *Boots*, 80 F.3d at 588. No, *Boots* did not, and could not, rest on a civil-criminal distinction (based on prosecutorial discretion) that the Supreme Court has uniformly rejected. It relied, instead, for its prohi-

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direct reference to § 1964(c), it is in this spirit that all of the Act's provisions should be read." *Id.* at 498, 105 S.Ct. 3275 (citations omitted). The Court noted the concern of the Court of Appeals over the uses to which civil RICO was being put but explained that these uses are "hardly a sufficient reason for assuming that the provision is being misconstrued." *Id.* at 499, 105 S.Ct. 3275. The Court stressed the expansive take it had on civil RICO by noting: "'[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Id.* (quoting *Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chi.*, 747 F.2d 384, 398 (7th Cir.1984) (alteration in original)). *See also, e.g., H.J. Inc. v. Northwestern Bell Tel., Co.*, 492 U.S. 229, 236, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) (commenting that the breadth of the predicate offenses and Congress's failure to interpret the term "pattern" in the statute applies to criminal and civil applications of the Act); *Sedima*, 473 U.S. at 493, 105 S.Ct. 3275 (rejecting a restrictive interpretation of § 1964(c) that would have made a criminal conviction a prerequisite for a civil RICO suit).

bition of criminal RICO actions, on the very same Learned Hand rationale that we rejected in *Pierce* and *Trapilo*, two cases which, moreover, in rejecting that rationale, self-consciously declined to follow *Boots*. *Pierce*, 224 F.3d at 164; *Trapilo*, 130 F.3d at 549.

IV

In the end, all the arguments based on the revenue rule's functions apply, if at all, with equal force in both the criminal and civil context. The first two have no meaning when the cause of action – whether criminal or civil – is based on American laws. The third – the desire to avoid interpretation of complex foreign laws – has little merit in the complex global economy. And it has, in any event, effectively been rejected in this circuit by *Trapilo* and *Pierce* because its rationale would as fully preclude criminal convictions followed by sentences based on Canada's revenue losses, as it would civil suit damage awards that use those losses as the basis for calculating the civil sanctions.[7]

All that being said, I fully share the majority's concerns that applying civil RICO to violations of foreign tax laws may be harmful to American trade interests and to American companies doing business abroad. And, I do not deny that the absence in civil cases of prosecutorial discretion removes one possible means by which such American companies can avoid domestic sanctions for some foreign misdeeds that many here might not wish to punish. But, this problem is in no way limited to, or especially severe with respect to, behavior that might be insulated from punishment through a revivification and expansion of the revenue rule. The problem derives, instead, from the extraordinary scope of

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[7] Notably in both the civil and criminal context, the lost tax revenue does not itself constitute the penalty exacted. Instead, the fine, jail time, or damages assessed simply use the lost revenue as a factor to be employed – after appropriate multiplication, etc. – to determine the size of the civil or criminal penalties to be imposed.

the RICO statute (the wisdom of whose breadth one may well doubt),[8] and from the Supreme Court's repeated unwillingness to distinguish between civil and criminal RICO, thereby declining to make use of prosecutorial discretion as a way of limiting RICO's breadth.

In this respect, I note my own discomfort with various aspects of RICO, and especially of civil RICO. I would not be displeased if the Supreme Court, faced with the possible effects of civil RICO in a case like this one, were to retreat from its insistence on an identical scope for civil and criminal RICO. Similarly, I would welcome a reconsideration by Congress of how far civil RICO ought to go.[9] As a Court of

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[8] As the Supreme Court has noted, the civil and criminal remedies taken together mean that "RICO provides for drastic remedies." *H.J. Inc.*, 492 U.S. at 233, 109 S.Ct. 2893.

[9] In support of its holding that civil RICO suits against "legitimate" business enterprises were permissible in addition to those brought against organized crime organizations, the Supreme Court stated: "Yet this defect – if defect it is – is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it...." *Sedima*, 473 U.S. at 499-500, 105 S.Ct. 3275.

Appeals judge, I cannot, however, join an opinion that applies an old and dubious common law rule, in ways that have nothing to do with its roots or rationales, in order to limit an act of Congress that the Supreme Court has repeatedly applied in the broadest possible ways.[10]

For these reasons, I, regretfully and respectfully, dissent.

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[10] The majority characterizes the issue in this case as whether Congress intended to abrogate the revenue rule when it passed RICO. As is apparent from my dissent, I view the issue differently. For me, the question is whether Congress, in RICO, created a cause of action giving rise to damages, and did so without regard to the existence of the revenue rule.

APPENDIX B

103 F.Supp.2d 134

United States District Courts,
N.D. New York

The ATTORNEY GENERAL OF CANADA,
Plaintiff,
v.
R.J. REYNOLDS TOBACCO HOLDINGS, INC., R.J. Reynolds Tobacco Co., R.J. Reynolds Tobacco International, Inc., RJR-MacDonald, Inc., R.J. Reynolds Tobacco Company, Puerto Rico, Northern Brands International, Inc., and Canadian Tobacco Manufacturers Council,
Defendants.

No. 99-CV-2194

June 30, 2000.

Hiscock, Barclay Law Firm, Syracuse, NY, Robert A. Barrer, of counsel, Bartlit, Beck Law Firm, Denver, CO, Fred H. Bartlit, Jr., Karma M. Giulianelli, of counsel, Bartlit, Beck Law Firm, Chicago, IL, Jason L. Peltz, of counsel, Notre Dame Law Firm, Notre Dame, IN, G. Robert Blakey, of counsel, for plaintiff.

Jones, Day, Reavis Firm, Washington, DC, Michael Peter Gurdak, Timothy John Finn, of counsel, for defendants

RJ Reynolds Tobacco Holdings, Inc. and RJ Reynolds Tobacco Co.

Scolaro, Shulman, Cohen, Lawler & Burstein, P.C., Syracuse, NY, Alan S. Burstein, of counsel, for defendants RJ Reynolds Tobacco Holdings, Inc., and RJ Reynolds Tobacco Co.

Sullivan & Heard Law Firm, New York City, C. Stephen Heard, for defendants RJ Reynolds Tobacco International, Inc., RJR-MacDonald, Inc., RJ Reynolds Tobacco Company PR, and Northern Brands International, Inc.

King & Spalding Law Firm, Washington, DC, William C. Hendricks, III, of counsel, for defendant Canadian Tobacco Manufacturers Council.

King & Spalding Law Firm, New York City, Patricia A. Griffin, for defendant Canadian Tobacco Manufacturers Council.

King & Spalding, Atlanta, GA, Richard A. Schneider, of counsel, for defendant Canadian Tobacco Manufacturers Council.

MEMORANDUM – DECISION & ORDER

McAVOY, District Judge.

The Attorney General of Canada ("Canada") commenced the instant action against Defendants alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et. seq.* arising out of an alleged smuggling scheme designed to avoid the payment of Canadian taxes. Presently before the Court are separate motions by all of the Defendants to dismiss the action pursuant to Fed. R. Civ. P. 12.

I. BACKGROUND

Because this matter is before the Court on Defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12, the following facts elicited from the Complaint are assumed to be true. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S.Ct. 2891, 2895, 125 L.Ed.2d 612 (1993).

A. The Parties

Plaintiff is the Attorney General of Canada, who brought the instant action on behalf of the nation of Canada.

At all times relevant hereto, Defendants R.J. Reynolds Tobacco Holdings, Inc. ("RJR-Holdings") (a Delaware corporation with its principal place of business in New York) and R.J. Reynolds Tobacco Company ("RJR-US") (a New Jersey corporation with its principal place of business in North Carolina), were the corporate parents of the other four Defendant corporations herein: RJR-Macdonald, Inc. ("RJR-Macdonald") (a Canadian corporation), R.J. Reynolds Tobacco Company PR ("RJR-PR") (a Delaware corporation with its principal place of business in Puerto Rico), R.J. Reynolds International, Inc. ("RJR-Int.") (a Delaware corporation with its principal place of business in Switzerland), and Northern Brands International, Inc. ("NBI") (a Delaware corporation with its principal place of business in North Carolina), which four companies will collectively be referred to as the "RJR Subsidiaries." Defendant Canadian Tobacco Manufacturers Council ("CTMC") is a Canadian corporation that acts as a trade association for the three major tobacco manufacturers in Canada: Imperial Tobacco Limited; Rothmans, Benson & Hedges, Inc.; and RJR-Macdonald.

B. The Canadian Taxation Scheme

In the 1980s and 1990s, Canada imposed three types of levies, or taxes, on tobacco. The Excise Act imposed taxes at the point of manufacture. The Excise Tax Act imposed taxes on the sale or delivery of tobacco products. Finally, the goods and services tax ("GST") imposed taxes on the sale of

tobacco at the wholesale and retail levels. In addition to these national taxes, each of the provincial governments imposed its own duties and taxes on tobacco products in an amount roughly equal to that of the national taxes. *See* Comp., ¶¶ 47-54.

Between 1982 and 1991, Canada increased the taxes on tobacco products by approximately 550 percent. *See id.*, ¶ 55. Some of these tax increases are purported to have been imposed to reduce tobacco consumption. *See id.*, ¶¶ 57, 59. In 1989, before the major tax increases, the average price per carton for cigarettes in Canada was under $26.00 (CDN). By 1991, the price per carton in Canada ranged from $42.00 to $60.00, the actual price depending upon the amount of taxes imposed by the provincial governments. *See id.*, ¶ 61. The Canadian taxes represented approximately $35.00 of the cost per carton, s*ee id.*, which created a large discrepancy between the price of tobacco in Canada and the United States. *Id.*, ¶ 60.

Tobacco manufactured in Canada and moved "in bond," or in transit, was exempt from taxation provided that it was not intended for domestic consumption. *See* Comp., ¶ 51.[1] Tobacco manufacturers seeking to move tobacco in bond had to prepare the proper export documentation, which included a representation of the amount of tobacco in each shipment that was to be consumed outside of Canada. *See* Comp., ¶ 51. Further, tobacco to be exported was required to be marked "Not For Sale in Canada." *Id.*, ¶ 52. Thus, Canadian tobacco exported to the United States could be sold for an approximate average price of $22.00 (CDN) per carton, or approximately one-half the per-carton price in Canada. If tobacco products were imported into designated foreign trade zones ("FTZs") within the United States, United States duties and taxes could also be avoided. *See id.*, ¶ 64. Tobacco

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[1] It is interesting to note, as an aside, that there is an extremely small market outside of Canada for Canadian tobacco.

goods that are legally imported into Canada are required to be declared. Upon import, the importer of record is obligated to pay any applicable Canadian taxes.

In 1992, in an attempt to reduce the incentive to smuggle exported products back into Canada, Canada imposed an export tax on cigarettes for export or sale through duty-free stores. *See id.*, ¶ 95.

In 1994, in a further effort to combat tobacco smuggling, Canada "rolled back" the excise taxes on tobacco products, re-imposed an export tax on Canadian tobacco products, and imposed a three year health promotion surtax on tobacco manufacturing companies' profits. *See id.*, ¶¶ 129-33.

C. The Alleged Smuggling Schemes

Canada alleges that prior to 1991, RJR Int. established the Special Markets Division in North Carolina ("Special Markets"), which sold tobacco products duty-free to Latin America, South America, the Caribbean, Mexico, and Canada. Canada further alleges that RJR-Macdonald exported Canadian tobacco to Special Markets, which then resold the tobacco products to certain customers. With RJR-Macdonald's and RJR-Int.'s participation, these customers then arranged to have the tobacco smuggled back into Canada for sale on the black market, thereby avoiding the payment of Canadian taxes. *See id.*, ¶¶ 69-71.

According to the Complaint, in order to stave off declining profits, in 1991 and 1992, RJR-Macdonald devised a scheme to export Canadian tobacco to customers who would then ship the product to the St. Regis Mohawk Reservation (the "Reservation"). From the Reservation, which straddles the United States-Canadian border, the tobacco was smuggled back into Canada for sale on the black market, free of duties and taxes. *See id.*, ¶¶ 72-94.

The Complaint alleges that RJR-Macdonald representatives met with Larry Miller and Robert and Lewis Tavano, who operated a company called LBL Importing, Inc.

("LBL"). LBL apparently represented that it was in the business of buying Canadian tobacco and selling it to Native Americans, who then smuggled the tobacco back into Canada for sale on the black market. RJR-Macdonald exported the tobacco from Canada (thereby avoiding any Canadian excise taxes) through FTZs in Buffalo, New York to LBL and other customers. LBL and the other customers then shipped the products to the Reservation to be smuggled back into Canada. *See id.*

The Complaint further alleges that, in 1992, after Canada imposed the new export tax, RJR-Macdonald moved two production lines for Canadian cigarettes from its plant in Montreal to RJR-PR (thereby avoiding the export tax). The tobacco manufactured at RJR-PR allegedly was packaged in RJR-Macdonald packaging, sold to Caribbean intermediaries, shipped through FTZs to customers in upstate New York, transferred by the customers at the FTZs to the Reservation, and then smuggled into Canada, thereby avoiding any import and sales taxes. *See id.*, ¶¶ 95-105.

It is alleged that in 1993, Defendants established NBI. Under the alleged NBI scheme, RJR-Macdonald manufactured tobacco in Canada and exported it to FTZs in New York. LBL then placed an order with NBI for the tobacco and wired money for the tobacco from LBL's account in New York to NBI's account in North Carolina. NBI paid a portion of the proceeds from LBL to RJR-Macdonald and another portion of the payment to either RJR-Macdonald, RJR-PR, or RJR-Int. After receiving payment, RJR-Macdonald notified the FTZs to transfer title to the customer (such as LBL); the customer then shipped the product to the Reservation; the tobacco was then shipped to the Canadian black market; and the resulting Canadian currency was then used to purchase United States checks and money orders to buy more cigarettes. *See id.*, ¶¶ 110-28.

D. Criminal Proceedings

In 1997, a grand jury indicted twenty-one individuals on various counts alleging that those criminal defendants smuggled tobacco and liquor products from the United States to Canada through the Reservation. *See United States v. Miller*, 26 F.Supp.2d 415, 419 (N.D.N.Y.1998). Similar to the Complaint herein, the indictment alleged that the smuggling scheme was designed to avoid the payment of duties and taxes levied by Canada upon the importation of tobacco products. *See id.* Many of the indicted individuals, including Miller and the Tavanos, pled guilty to violating 18 U.S.C. § 1956(h) (conspiracy to launder monetary instruments or to engage in monetary transactions in property derived from specified unlawful activity).

NBI pled guilty to aiding and abetting others who violated 18 U.S.C. § 542 (entry of goods by means of false statements).

In 1999, Leslie Thompson, an executive of NBI, was indicted and ultimately pled guilty to violating 18 U.S.C. § 1956(h).

E. The Complaint

On December 21, 1999, Canada filed the instant lawsuit. The Complaint asserts four causes of action pursuant to RICO's civil action provision, 18 U.S.C. § 1964(c), alleging violations of 18 U.S.C. §§ 1962(c)-(d) (the First through Fourth Causes of Action), and asserting a common law fraud claim (the Fifth Cause of Action). As required by this District's local rules, Canada also filed a Civil RICO statement. *See* N.D.N.Y.L.R. § 9.2 (1999).

II. DISCUSSION

A. The Pending Motions

Presently before the Court are motions by all Defendants seeking to dismiss the Complaint. The RJR Defendants (that is, all Defendants except CTMC), move to dismiss on

the grounds that Canada's action is barred by the Revenue Rule and that the Complaint fails to state a claim under RICO. Defendants RJR-Holdings and RJR-US further move to dismiss under the Acts of State and Political Question doctrines. Defendants RJR-Int., RJR-Macdonald, RJR-PR, and NBI also move to dismiss this action because it is barred by the applicable statute of limitations. All the RJR Defendants have adopted and incorporated one another's motions to dismiss. The RJR Defendants also assert that, if the Court dismisses the RICO claim, it should decline to exercise supplemental jurisdiction over the common law fraud claim.

CTMC separately moves to dismiss on the grounds of lack of personal jurisdiction and *forum non conveniens*.

B. Standard of Review of RJR Defendants' Motions to Dismiss

In reviewing motions brought pursuant to Fed. R. Civ. P. 12(b)(6), the Court must accept all allegations in the Complaint and draw all reasonable inferences in favor of the non-moving party. *See Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir.1999). The Complaint may be dismissed only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)).

With this standard in mind, the Court will now address the various arguments raised by Defendants.

C. The Revenue Rule

The RJR Defendants argue that Canada should not be entitled to maintain the instant action because it is, in essence, an attempt by Canada to recoup unpaid taxes and enforce its revenue laws (and obtain treble damages along the way), which is barred by the Revenue Rule. Canada responds that the Revenue Rule is inapplicable because it is not seeking to enforce its tax statutes, but, rather, is attempting to recover damages (some of which include lost tax revenues) as a result

of violations of United States law (namely, RICO). Canada argues that "Canadian revenue law becomes relevant only as a matter of *fact* in calculating one component of Canada's damages, not as a matter of *law* in determining whether Defendants are liable." Dkt. No. 77, at p. 6 (emphasis in original).

The common law Revenue Rule provides that United States "courts will normally not enforce foreign tax judgments, the rationale for which is that issues of foreign relations are assigned to, and better handled by, the legislative and executive branches of the government." *United States v. Trapilo*, 130 F.3d 547, 550 (2d Cir.1997), *cert. denied*, 525 U.S. 812, 119 S.Ct. 45, 142 L.Ed.2d 35 (1998); *see also United States v. Boots*, 80 F.3d 580, 587 (1st Cir.), *cert. denied*, 519 U.S. 905, 117 S.Ct. 263, 136 L.Ed.2d 188 (1996); *Her Majesty the Queen in Right Of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1164 (9th Cir.1979) (quoting Lord Mansfield's proclamation in *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (1775) that "no country ever takes notice of the revenue laws of another"). As Judge Learned Hand stated more than seventy years ago:

> To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities.... Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir.1929) (L. Hand, J., concurring), *aff'd*, 281 U.S. 18, 50 S.Ct. 175, 74 L.Ed. 673

(1930) (declining to express an opinion whether a federal court in one state would enforce the revenue laws of another state); *see also United States v. First Nat'l City Bank*, 379 U.S. 378, 85 S.Ct. 528, 538, 13 L.Ed.2d 365 (1965) (dissenting opinion) ("Foreign courts in customary international practice ... do not enforce foreign tax judgments."); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 932, 950, 11 L.Ed.2d 804 (1964) (noting that federal and state cases have relied on the principle that a court need not give effect to the penal or revenue laws of foreign countries or sister states); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 56 S.Ct. 229, 233, 80 L.Ed. 220 (1935) (assuming that courts of one state are not required to entertain a suit to recover taxes levied under the statutes of another, but holding that the courts of one state must give full faith and credit to *judgments* for such taxes in another state). While the Revenue Rule has not often been litigated in the federal courts, courts have, for example, refused to enforce foreign tax judgments in United States courts. *See Gilbertson*, 597 F.2d 1161. Moreover, while the origins of the Revenue Rule and its continued applicability are subject to serious question (at least with respect to the enforcement of foreign tax *judgments* as opposed to unadjudicated tax claims),[2] the rule appears to be the law of this Circuit. *See U.S. v. First Nat. City Bank*, 321 F.2d 14, 23-24 (2d Cir.1963), *rev'd on other grounds*,

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[2] *See, e.g., Trapilo*, 130 F.3d at 550, n. 4 (quoting Restatement (Third) of the Foreign Relations Law of the United States § 483) ("In an age when virtually all states impose and collect taxes and when instantaneous transfer of assets can be easily arranged, the rationale for not recognizing or enforcing tax judgments is largely obsolete."); *Banco Frances e Brasileiro v. Doe*, 36 N.Y.2d 592, 370 N.Y.S.2d 534, 538, 331 N.E.2d 502 (1975), *cert. denied*, 423 U.S. 867, 96 S.Ct. 129, 46 L.Ed.2d 96 (1975) ("Nor is the [revenue] rule analytically justified. Indeed, much doubt has been expressed that the reasons advanced for the rule, if ever valid, remain so. But inroads have been made.... Some do consider that, in light of the economic interdependence of all nations, the courts should be receptive even to extranational tax and revenue claims").

379 U.S. 378, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965); *Moore*, 30 F.2d at 602; *see also Trapilo*, 130 F.3d at 552-53.[3]

In *First Nat. City Bank*, the Second Circuit clearly recognized the Revenue Rule when it stated that "[i]t has long been a general rule that one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim." 321 F.2d at 23-24. The *Moore* Court held such a rule applicable to tax claims among states (although the Supreme Court later held that states must give full faith and credit to tax judgments of other states). *See Moore*, 30 F.2d 600.

Arguably, the *Trapilo* Court neither expressly recognized nor disavowed the Revenue Rule. *See* 130 F.3d at 550. Based upon the *Trapilo* Court's holding that a prosecution for a violation of 18 U.S.C. § 1343 would not implicate the Revenue Rule because such a prosecution would not necessitate the construction of Canadian revenue law, it was not required to reach the issue currently before this Court. However, it could be argued that the *Trapilo* Court recognized the existence and potential applicability of the Revenue Rule in a proper case when, in determining that a prosecution for wire fraud did not impinge upon the Revenue Rule, it stated that "[t]he intent to defraud does not hinge on whether or not the appellees were successful in violating Canadian revenue law .... Consequently, there is no obligation to pass on the validity of Canadian revenue law, and the common law revenue rule is not properly implicated." 130 F.3d at 552-53. That the Revenue Rule is recognized in this Circuit is supported by the *Trapilo* Court's further statement that "[t]he simple fact that the scheme to defraud involves a foreign sovereign's revenue laws does not draw our inquiry into forbidden waters

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[3] Were the Court writing on a clean slate (which, as will be discussed, it is not), it would be inclined to find the Revenue Rule to be outdated (to the extent it was ever properly recognized by courts in the United States in the first instance) and the rationales for the rule to be largely unpersuasive, at least with respect to the recognition of foreign tax judgments.

reserved exclusively to the legislative and executive branches of our government." *Id.*, at 553. Reading these three cases together, the Court finds the Revenue Rule to be recognized in this Circuit.

The United States – Canadian Income Tax Convention Treaty of 1980 (the "Treaty") does not alter this result. That Treaty permits states to assist Canada in the collection of certain specified taxes (and vice versa). *See* Dkt. 79, Ex. 17, p. 2351, Art. XXVI A(1). The technical explanation to paragraph 1 explicitly notes that "[t]his provision overrides the traditional rule that a court *judgment* based on a tax debt is not enforceable in a foreign jurisdiction." *Id.* (emphasis supplied). Importantly, just as the technical explanation speaks to abrogation of the Revenue Rule with respect to *judgments* (as opposed to unadjudicated revenue claims), the Treaty itself speaks only to providing assistance with respect to "finally determined" revenue claims. *See id.*. at Art. XXVI A(2). The technical explanation defines "[a] revenue claim [as] finally determined when the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted." *See id.* Thus, the Treaty speaks only to judgments or their equivalent; not to efforts by Canada to enforce its revenue laws in the first instance in courts in the United States. *See id.* at Art. XXVI A(3),(5). The Treaty further provides that courts in the United States may not engage in "judicial review of ... [Canada's] finally determined revenue claim ... based on any such rights that may be available under the laws of either Contracting State." *See id.* at Art. XXVI A(5) (emphasis supplied). Thus, while the Treaty may abrogate the Revenue Rule insofar as the two countries may recognize one another's final judgments (or their equivalents), it does not go so far as to eliminate the Rule with respect to unadjudicated or otherwise non-final revenue claims. *See, e.g., Gilbertson*, 597 F.2d at 1165.

Recognizing the existence of the Revenue Rule, however, only begs the impending question – whether the instant civil RICO claim commenced by Canada is precluded by that rule.

To analyze this issue, we must first look to the nature of a civil RICO claim. Such claims are authorized pursuant to 18 U.S.C. § 1964(c), which provides, in pertinent part, as follows:

> Any person injured in his business or property by reason of a violation of [18 U.S.C.] section 1962 ... may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Section 1962, in turn, speaks to activities involving racketeering. *See* 18 U.S.C. § 1962. Racketeering activity is defined in 18 U.S.C. § 1961(a) and includes mail and wire fraud.

Thus, to state a claim under § 1964(c), a plaintiff must plead: "'(1) conduct; (2) of an enterprise; (3) through a pattern (4) of racketeering activity.'" *Anatian v. Coutts Bank, (Switzerland) Ltd.*, 193 F.3d 85, 88 (2d Cir.1999) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985), *cert. denied*, --- U.S. ----, 120 S.Ct. 1241, 146 L.Ed.2d 100 (2000)). "In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima*, 105 S.Ct. at 3285; *See also* 18 U.S.C. § 1964(c) ("Any person injured in his business or property ... may sue therefor."); *Anatian*, 193 F.3d at 88; *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1347 (2d Cir.1994); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 767 (2d Cir.1994), *cert. denied*, 513 U.S. 1079, 115 S.Ct. 728, 130 L.Ed.2d 632 (1995); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d

Cir.1990) ("Because a conspiracy – an agreement to commit predicate acts – cannot by itself cause any injury, we think that Congress presupposed injury-causing overt acts as the basis of civil standing to recover for RICO conspiracy violations").

Here, the alleged racketeering activity includes violations of the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343 respectively. *Trapilo* makes it clear that a criminal prosecution for a violation of either of these statutes does not implicate the Revenue Rule. *See* 130 F.3d 547. This is because proof of a violation of either of these statutes requires "(1) the forming of the scheme to defraud, however and in whatever form it may take, and (2) use of [mail and wire communications] in its furtherance. If that is satisfied, more is not required." *Id.* at 551 (quoting *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir.1958)). In other words, "[t]he statute reaches any scheme to defraud involving money or property, whether the scheme seeks to undermine a sovereign's right to impose taxes, or involves foreign victims and governments." *Id.* at 552. Pursuant to this reasoning:

> At the heart of [an] indictment [for mail or wire fraud] is the misuse of the [mail or] wires in furtherance of a scheme to defraud the Canadian government of tax revenue, not the validity of a foreign sovereign's revenue laws. The statute condemns the intent to defraud, that is, the forming of the scheme to defraud, however and in whatever form it may take. The intent to defraud does not hinge on whether or not the appellees were successful in violating Canadian revenue law, as section[s] 1341 [and 1343] [punish] the *scheme*, not its success. Consequently, there is no obligation to pass on the validity of Canadian revenue law, and the common law revenue rule is not properly implicated.

Id. at 552-53 (emphasis in original, internal quotations, alterations, and citations omitted). Thus, the mere fact that Canada claims the racketeering activity to have included mail and wire fraud, the object of which was to avoid the payment of Canadian taxes, does not implicate the Revenue Rule. *See id.* at 553.

The problem arises when we look back to the standing and recovery requirements of a claim under 18 U.S.C. § 1964(c) and, in particular, the requirement that a civil RICO plaintiff allege injury to business or property. *See Sedima*, 105 S.Ct. at 3285. This injury requirement imposes an element not present in the indictment that was the subject of *Trapilo*. *See United States v. Sasso*, 215 F.3d 283, 292 (2d Cir.2000) ("[Section] 1964(c), which permits a civil RICO suit for treble damages by '[a]ny person injured in his business or property' due to a criminal RICO violation, plainly requires a showing of injury."). The government in *Trapilo* was not required to prove any injury to Canada in order to prove a violation of 18 U.S.C. §§ 1341 or 1343. *See Trapilo*, 130 F.3d at 551 (stating that only the intent to defraud is necessary and that success of the scheme is irrelevant).

Here, by contrast, to state a civil RICO claim, Canada must prove more than the mere intent to defraud another of property or the mere establishment of a scheme to defraud utilizing the mails or wire communications in furtherance of that scheme. Again, to have standing and to recover, Canada must allege injury in fact, which ultimately obligates it to prove that some act or acts in furtherance of the scheme caused it to sustain injury. *See* 18 U.S.C. § 1964(c); *Sedima*, 105 S.Ct. at 3285. This distinction is critical to the outcome of this action.

Canada's Complaint asserts two types of injury: (1) lost tax revenues; and (2) increased law enforcement costs expended to combat the smuggling operations. In its civil RICO statement, Canada lists the following injuries:

> (1) Increased tobacco consumption among its population, especially its youth.
>
> (2) Continued tobacco consumption among existing smokers.
>
> (3) Monies spent seeking to stop the smuggling and catch the wrongdoers.
>
> (4) Lost revenue from the evasion of tobacco duties and taxes.
>
> (5) Lost revenue because Defendants' conduct compelled the rollback of taxes and duties.

See Civil RICO stmnt. Dkt. No. 11, pp. 57, 159-60. Certain of the types of injuries alleged by Canada, namely lost revenues resulting from the evasion of duties and taxes, require it to show that the scheme utilizing the mails and wire communications to defraud it out of tax revenue was successful (at least, in part, insofar as it actually evaded Canadian tax laws thereby causing Canada to lose revenue). This is an important distinction between the instant case and *Trapilo* – if the scheme was unsuccessful, Canada would not have lost tax revenue and would not have suffered injury in fact. Thus, to pursue its claim for damages relating to lost tax revenue, Canada will have to prove, and the Court will have to pass on, the validity of the Canadian revenue laws and their applicability hereto and the Court would be, in essence, enforcing Canadian revenue laws.[4] Enforcing foreign revenue laws is precisely the type of meddling in foreign affairs the Revenue Rule forbids. *See Trapilo*, 130 F.3d at 553; *See also Sabbatino*, 84 S.Ct. at 932-33, 950-951; *Boots*, 80 F.3d 580.

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[4] Defendants do not challenge, *per se*, the actual "validity" of the Canadian revenue laws. In the context of the Revenue Rule, however, "[t]he revenue laws of one state have no force in another.... [and] the tax laws of one state cannot be given extraterritorial effect, so as to make collections through the agency of the courts of another state." *Moore*, 30 F.2d at 602.

To reiterate Judge Learned Hand's statement in Moore, "[t]o pass upon the provisions for the public order of another state [or sovereign nation] is, or at any rate should be, beyond the powers of a court; it involves the relations between the [nations] themselves, with which courts are incompetent to deal, and which are intrusted to other authorities." 30 F.2d at 604. The fact that the executive branch of the United States Government has Seen fit to enter into treaties with Canada with respect to the recognition and enforcement of certain tax liabilities, to delineate the extent to which one country's revenue claims may be enforced in the other, and to limit such enforcement to "finally determined" revenue claims, strongly suggests that Canada's RICO claim would draw this Court's "inquiry into forbidden waters reserved exclusively to the legislative and executive branches of our government." *Trapilo*, 130 F.3d at 553. As long as the Revenue Rule prevails (as evidenced by Second Circuit precedent and the Treaty), this Court is precluded from affording the Canadian government an alternative mechanism not expressly authorized by the legislative and/or executive branches of government – those branches particularly responsible for establishing and conducting international relations – by which it may recoup lost tax revenues in the courts of the United States. *See Trapilo*, 130 F.3d at 553; *Moore*, 30 F.2d at 604; *Gilbertson*, 597 F.2d at 1164-65.

Thus, to the extent Canada seeks to prove injury to business and property as a result of lost tax revenues and recover therefor, its claims are barred by the Revenue Rule and, therefore, must be dismissed. The remaining claimed injuries – increased smoking and increased law enforcement costs – do not implicate any Canadian revenue laws and are not precluded by the Revenue Rule.[5]

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[5] The ensuing discussion will be analyzed in the absence of the claims based upon the fraudulent avoidance of taxation.

D. Act of State Doctrine

Defendants next move to dismiss the Complaint claiming that the act of state doctrine prohibits the court from passing judgment on the political acts of Canada. Defendants argue that the prosecution and defense of this matter will involve political acts including: (1) inquiry into the motivations of the Canadian Parliament in passing and/or repealing various tobacco-related taxes, (2) discovery with respect to Canadian officials and law enforcement personnel, and (3) the determination of the credibility of Canadian officials. Canada responds that the act of state doctrine is inapplicable because Canada has willingly subjected itself to the process of this Court and, more importantly, the instant litigation does not involve the validity of an official act of a foreign sovereign.

The act of state doctrine plays an important role in restraining court involvement in the conduct of foreign affairs. *See W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l.*, 493 U.S. 400, 110 S.Ct. 701, 704, 107 L.Ed.2d 816 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 937, 11 L.Ed.2d 804 (1964). "In every case in which [the Supreme Court has] held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick*, 110 S.Ct. at 704.

Because the Court finds the Revenue Rule to preclude Canada from pursuing its RICO claim seeking damages for lost tax revenues, it need not decide whether the act of state doctrine applies to that portion of the Complaint and, in particular, to a determination of the validity of Canadian revenue laws or the motivation behind the passage of such laws. With respect to the other portions of the Complaint, the Court finds the act of state doctrine inapplicable.

Neither the diligence (or lack thereof) with which Canada is purported to have acted in discovering the alleged

fraud, the subjective beliefs of various Canadian officials regarding whether they relied upon the export documentation prepared and submitted by RJR-Macdonald, nor the sufficiency of Canadian law enforcement efforts, constitutes an act of state within the meaning of the doctrine.

Even assuming these acts to be acts of state, the issues in this case do not require a determination of the validity, or legality, of such acts. "The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations." *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 1863, 48 L.Ed.2d 301 (1976).

Here, the issues involve whether various acts or events transpired; not the legality of those acts. *See Sharon v. Time, Inc.*, 599 F.Supp. 538, 545-46 (S.D.N.Y.1984) (cited with approval by the Supreme Court in *W.S. Kirkpatrick*, 110 S.Ct. at 705). Thus, the focus at trial would be whether the actions undertaken by Canada and its officials would have reasonably alerted them to an ongoing fraud against its revenue statutes and whether Canada reasonably relied on various representations; not a determination of whether any of Canada's actions were validly, or legally, undertaken. *See Sharon*, 599 F.Supp. at 545-46. Stated otherwise, passing judgment upon "the motives for the tax repeal, the sufficiency of the efforts made by Canadian government agencies to investigate cigarette smuggling, and the alleged reliance of the Canadian government on statements made by defendant," *See* RJR-Holdings and RJR-US Mem. in support of Motion to Dismiss, Dkt. No. 64, p. 12, does not require a determination regarding the validity of the acts of a foreign sovereign.

Furthermore, the Court discerns no policy reasons why a factual determination of these issues would hinder the conduct of foreign affairs – the primary reason behind the act of state doctrine. *See W.S. Kirkpatrick*, 110 S.Ct. at 704; *see*

also Underhill v. Hernandez, 168 U.S. 250, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897); *Bandes v. Harlow & Jones, Inc.*, 852 F.2d 661, 666 (2d Cir.1988). "Moreover, the act of state doctrine reflects respect for foreign states, so that when a state comes into our courts and asks that our courts scrutinize its actions, the justification for application of the doctrine may well be significantly weaker." *Republic of Philippines v. Marcos*, 806 F.2d 344, 359 (2d Cir.1986), *cert. dismissed*, 480 U.S. 942, 107 S.Ct. 1597, 94 L.Ed.2d 784 (1987).

In addition, the act of state doctrine arguably works against Defendants because, rather than depriving a court of jurisdiction, the doctrine instructs that "the act within its own boundaries of one sovereign State becomes a rule of decision for the courts of this country." *W.S. Kirkpatrick*, 110 S.Ct. at 705 (internal quotations and alterations, and citation omitted); *see also Sharon*, 599 F.Supp. at 547. In other words, the doctrine could work to compel this Court to presume the validity of the various actions of the Canadian government at issue.

For the foregoing reasons, the Court finds that the act of state doctrine does not form a basis upon which it should refrain from entertaining the present action.

E. Political Question Doctrine

Defendants next claim that the political question doctrine renders this case non-justiciable because the instant litigation involves issues committed to different branches of the United States government (international tax collection), a lack of judicially discoverable and manageable standards (inquiry into the reasons behind the repeal of the various tobacco taxes and the sufficiency of Canadian law enforcement efforts), and potential embarrassment to the legislative and/or executive branches of government (the adjudication of the conduct, knowledge and motives of a range of Canadian government officials). Canada responds that this case involves application of United States law (RICO and common law fraud) and will

not force this Court to make foreign policy determinations or otherwise thrust this Court into the foreign policy arena.

"Not every case 'touching foreign relations' is nonjusticiable." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir.1995) (quoting *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 707, 7 L.Ed.2d 663 (1962)), *cert. denied*, 518 U.S. 1005, 116 S.Ct. 2524, 135 L.Ed.2d 1048 (1996). Thus, courts must consider the relevant factors on a case-by-case basis to determine whether the political question doctrine is implicated. *See id.*

In *Baker*, the Supreme Court enunciated the standards for determining whether an issue is non-justiciable under the political question doctrine:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

82 S.Ct. at 710; *See also Padavan v. United States*, 82 F.3d 23, 27 (2d Cir.1996). Upon review of these factors, the Court finds the political question doctrine to be inapplicable.

First, the issue involved here, whether Defendants' fraudulent acts injured Canada, is not something that has been constitutionally committed to a coordinate branch of govern-

ment. To the contrary, the adjudication of RICO and fraud claims is entrusted to the judiciary. *See, e.g., Kadic*, 70 F.3d at 249; *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 49 (2d Cir.1991). Second, the Court agrees with Canada that the instant RICO and common law fraud claims do not implicate undiscoverable or unmanageable judicial standards. The legal analysis of these claims rests upon readily ascertainable domestic law and judicial standards. *See Kadic*, 70 F.3d at 249; *Klinghoffer*, 937 F.2d at 49 (tort action against Palestinian Liberation Organization does not implicate political question doctrine). Third, resolution of Canada's remaining claims will not implicate policy determinations of a kind not suitable for judicial resolution. Again, RICO and fraud claims are typically handled by the judiciary. *See Kadic*, 70 F.3d at 249; *Klinghoffer*, 937 F.2d at 49-50. Fourth, nothing this Court does in the course of this litigation should express a lack of respect for the coordinate branches of government. The Court's involvement will be limited to litigating a dispute between Canada and Defendants and will not involve any policy pronouncements or otherwise impinge upon the foreign policy of this nation. *See Klinghoffer*, 937 F.2d at 49-50. Fifth, the Court is unaware of any previously made political decisions the adherence to which would suggest that this Court should decline to move forward with this matter. To the contrary, the criminal prosecutions initiated by the United States Attorney's Office suggest that the political decision made by the executive branch is to prosecute persons who violate RICO and the wire and mail fraud statutes. *See Klinghoffer*, 937 F.2d at 49-50. Sixth, and finally, there have been no multifarious pronouncements by other governmental departments of which this Court is aware that could result in embarrassment if the Court allowed this matter to proceed. In sum, with respect to these last three factors (and having eliminated Canada's tax-based claims), a judicial decision would not contradict prior decisions taken by a coordinate political branch and it is unclear how anything done by this

Court will interfere with the important governmental interests of those coordinate branches. *See Kadic*, 70 F.3d at 249. Although foreign policy may be tangentially affected here, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 82 S.Ct. at 707; *See also Kadic*, 70 F.3d at 249; *Can v. United States*, 14 F.3d 160, 163 (2d Cir.1994); *Klinghoffer*, 937 F.2d at 49. Thus, the political question doctrine does not render Canada's remaining claims non-justiciable.

F. Whether Canada is a "Person" Under RICO

Defendants next argue that Canada's RICO claims are statutorily barred because a foreign state is not a "person" as that term is defined in 18 U.S.C. § 1961(3). The substance of Defendants' argument is as follows: RICO defines the term "person" identically regardless of whether that person is the RICO plaintiff or defendant. Thus, someone, or something, that falls within RICO's definition of a "person" may not only bring suit under 18 U.S.C. § 1964(c), but is also exposed to criminal and civil liability thereunder. However, foreign states, such as Canada, enjoy sovereign immunity and cannot be haled into United States courts as defendants. Defendants argue that if foreign states are considered to be "persons" under RICO and, thus, subject to civil and criminal liability, this would amount to an unexpressed abrogation of their sovereign immunity – something Congress did not intend. Carrying the argument to the next step, Defendants maintain that because foreign states cannot be RICO defendants because of sovereign immunity, they fall outside the statutory definition of a "person" and, thus, cannot be RICO plaintiffs. To hold otherwise, the argument goes, the Court would have to find that Congress intended different definitions of the word "person" within the same statute, depending on whether we are looking at the "person" as a plaintiff or defendant. Canada responds that, when RICO is analogized to the antitrust statutes and under the authority of *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978),

foreign governments are "persons" within RICO's statutory definition.

As with any matter involving statutory construction, the best place to start is with the statute itself. *See U.S. v. Bonanno Organized Crime Fam. of La Cosa Nostra*, 879 F.2d 20, 21 (2d Cir.1989). As a general rule, the term "person" does not include the sovereign. *See United States v. Cooper Corp.*, 312 U.S. 600, 61 S.Ct. 742, 743, 85 L.Ed. 1071; *see also Vermont Agency of Natural Resources v. United States ex. rel. Stevens*, --- U.S. ----, ----, 120 S.Ct. 1858, 1866, 146 L.Ed.2d 836, ---- (2000). This, however, is not a "hard and fast rule of exclusion." *Cooper*, 61 S.Ct. at 743. "The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids in construction which may indicate an intent, by the use of the term, to bring state or nation [or foreign states] within the scope of the law." *Cooper*, 61 S.Ct. at 743-44.

Congress provided a specific definition of the word "person" when used in RICO. Section 1961(3) provides that "'person' includes any individual or entity capable of holding a legal or beneficial interest in property." Canada does not attempt to argue that it is an individual, but, rather, claims that it is an entity capable of holding a legal or beneficial interest in property.

As defined by Black's Law Dictionary, an "entity" includes "state, United States, and foreign government." BLACK'S LAW DICTIONARY 532 (6th ed.1990) (citing REV. MODEL BUS. CORP. ACT § 1.40.). Thus, applying the plain language of the statute and the common understanding of the words employed therein, the definition of a "person" includes foreign states. *See Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1358 (9th Cir.1988) ("[A] governmental body is a person within the meaning of 18 U.S.C. § 1961(3).... The foreign nature of the [plaintiff] does not deprive it of statutory personhood."), *cert. denied* 490 U.S. 1035, 109 S.Ct. 1933, 104 L.Ed.2d 404 (1989); *see also*

Pfizer, 98 S.Ct. 584 (foreign states are "persons" within the antitrust laws).

Relying on *Bonanno*, Defendants argue that governments are not persons within the meaning of § 1961(3). In *Bonanno*, the United States government sought treble damages under 18 U.S.C. § 1964(c) against the defendants therein. Like Canada does here, the United States claimed that it was an entity capable of holding legal or beneficial title in property and, thus, a "person." The Second Circuit disagreed.

The *Bonanno* Court found that the United States is not a "person" within the meaning of RICO despite its ability to hold legal or beneficial interest in property. *See Bonanno*, 879 F.2d at 22. The *Bonanno* Court reasoned that when Congress intends to include the United States in a statutory provision, it does so explicitly; not by a catchall word such as "person." *See id.* The *Bonanno* Court stated that:

> If the government's standing under Section 1964(c) is "plain," one would be at a loss for adjectives to describe the manner in which Congress ordinarily expresses its intention to render a statutory provision applicable to the United States; by explicit reference to the United States in the operative language of the statute or by explicit inclusion of the United States in the statutory definition of the object or objects affected by the law.

Bonanno, 879 F.2d at 22. As the Second Circuit noted in *Bonanno*, this is evident from the various statutory provisions of RICO itself. *See id.*; *see, e.g.*, 18 U.S.C. § 1964(b)("The Attorney General may institute proceedings under this section").

The *Bonanno* court relied heavily on *Cooper*, 61 S.Ct. 742, in which the Supreme Court determined that the United States was not a "person" within the meaning of § 4 the Clayton Act, 15 U.S.C. §§ 12, 15. While *Cooper* involved anti-

trust instead of racketeering violations, the *Bonanno* Court noted that the antitrust laws served "as a model for the structure and language of RICO." *Bonanno*, 879 F.2d at 24. In fact, "the 'clearest current' in the legislative history of RICO is the reliance on the Clayton Act model." *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 103 (2nd Cir.1990). As the Second Circuit noted, "[if] the standing provisions of the antitrust laws have not precisely been incorporated into RICO, they are, at a minimum, pertinent to the Act and contain, in certain respects, identical language." *Bonanno*, 879 F.2d at 25. Reference to antitrust cases is, therefore, instructive when interpreting RICO.

However, the reasoning in *Bonanno* and *Cooper*, insofar as it restricts the standing of the United States, does not apply when a foreign sovereign's standing is at issue. Foreign states are not on the same footing as is the United States and Congress does not treat foreign states as it does the United States when drafting statutes. As the Second Circuit stated in *Bonanno*, when Congress refers to the United States in a statute, it does so explicitly. *See Bonanno*, 879 F.2d at 22; *See also Cooper*, 61 S.Ct. at 744 ("[I]f the purpose [of the statute] was to include the United States, 'the ordinary dignities of speech would have led' to its mention by name."). The same cannot be said with respect to foreign states.[6] *See, e.g., Pfizer, Inc.*, 98 S.Ct. at 588-91; *Marcos*, 862 F.2d at 1358; but *See* 16 U.S.C. § 1532(15) (defining "person" to include "any officer, employee, agent, department, or instrumentality of ... any foreign government.").

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[6] Congress amended the Clayton Act to address the situation of foreign states suing under that Act. Importantly, however, Congress did not expressly grant standing to foreign states and, perhaps more importantly, it did not exclude foreign states from the definition of "person." Rather, Congress allowed for actual damages for "any person who is a foreign state." 15 U.S.C. § 15(b)(1). This tends to indicate Congress's approval of the Supreme Court's definition in Pfizer of the term "person" to include foreign states.

Aside from the way in which Congress explicitly refers to the United States and not to foreign states, there is another critical distinction between the United States and foreign states with respect to the RICO and antitrust statutes. Important to the decisions in *Bonanno*, 879 F.2d at 22, 25-25, 27 (referring to RICO), and *Cooper*, S.Ct. at 745 (referring to the antitrust laws), was that the United States allotted itself several "potent weapons for anforcing the Act." *Georgia v. Evans*, 316 U.S. 159, 62 S.Ct. 972, 973, 86 L.Ed. 1346 (1942). Therefore, declining to afford the United States a treble damages remedy was not detrimental to its ability to assert its rights under the two acts.

In contrast, foreign sovereigns lack any remedy other than an action for treble damages under either the antitrust acts or RICO. In *Pfizer*, a divided Supreme Court made this distinction in the antitrust context, holding that foreign governments could sue for treble damages under the antitrust laws.[7] Distinguishing *Cooper*, the Court emphasized the reasoning used in *Georgia v. Evans*, 316 U.S. 159, 62 S.Ct. 972, 86 L.Ed. 1346, in which the State of Georgia sought to recover treble damages under the antitrust statutes. The *Evans* Court noted that "[t]he considerations which led to th[e] conclusion [in *Cooper* that the United States is not a 'person'] are entirely lacking here." 62 S.Ct. at 974. Specifically, the *Evans* Court reasoned that excluding states from the definition of "person" in the antitrust acts would deprive them of any remedy for antitrust violations, a conclusion "[n]othing in the Act, its history, or its policy, could justify." 62 S.Ct. at 974. Emphasizing that states had no specific or explicit grants of authority or rights of action under the antitrust laws, the Supreme Court held that "[w]e can perceive no reason for be-

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[7] As noted in the preceding footnote, in response to the *Pfizer* decision, Congress amended the Clayton Act to limit foreign states to actual, rather than treble, damages. *See* 15 U.S.C. § 15; *See also* H.R. REP. NO. 476, 97th Cong. (1982), *reprinted in* 1982 U.S.C.C.A.N. 3495.

lieving that Congress wanted to deprive a State ... of the civil remedy of treble damages which is available to other[s] ... who suffer through violation of the Act." *Evans*, 62 S.Ct. at 974. It was on this basis, as well as general notions of international comity, that the *Pfizer* Court determined that foreign sovereigns are "persons" within the meaning of the antitrust laws. *See Pfizer*, 434 U.S. at 318, 98 S.Ct. 584.

A similar conclusion is warranted here. As with the antitrust laws, the RICO laws allow the United States several specific remedies including the rights to: (1) commence criminal prosecutions; (2) obtain injunctive relief; (3) seize property, *see* 18 U.S.C. §§ 1963; 1964(b); and (4) commence a civil action. *See* 18 U.S.C. § 1964(b),(d). These rights are not, however, afforded to foreign states. Thus, if foreign states do not fall within the definition of "person" and, accordingly, may not sue under § 1964(c), then they would be deprived of a RICO remedy for any injuries they may have sustained as a result of racketeering activity. There is nothing in the legislative history or elsewhere tending to suggest that Congress intended to exclude foreign states from the civil remedies afforded in § 1964. *See Marcos*, 862 F.2d at 1358.[8]

There is another important distinction between the antitrust laws and RICO that further leads this Court to conclude that Canada is a "person" under RICO. Although the civil enforcement provisions of § 4 of the Clayton Act, 15 U.S.C. § 15, and 18 U.S.C. § 1964(c) are quite similar, the statutory definition of "person" under those statutes differ. The Clayton Act defines the word "person" to "include corporations and associations existing under or authorized by the laws of

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[8] The Court is cognizant that the anomaly raised by the *Pfizer* decision will similarly result from this Court's holding. Thus, foreign states will "have a more potent remedy than the United States in seeking monetary damages for violations of the [RICO] laws." *See* H.R. REP. 393, 1982 U.S.C.C.A.N. at 3500. As with the Clayton Act, however, the resolution of this anomaly lies with Congress; not the courts.

either the United States, the laws of any of the territories, the laws of any State, or the laws of any foreign country." 15 U.S.C. § 12(a). RICO, however, has a much more expansive definition, providing simply that a person includes any entity capable of holding a legal or beneficial interest in property – something Canada is surely able to do. Had Congress intended to exclude foreign states, it could have done so explicitly. *See, e.g.*, 11 U.S.C. § 101(41) (excluding governmental units from the definition of "person").

Although the sovereign immunity issues raised by Defendants and by the *Bonanno* Court pose, perhaps, an interesting paradox, the Court need not delve into that issue because it has been resolved in the antitrust context by the Supreme Court in *Pfizer*,[9] the reasoning of which applies equally here. Moreover, the Second Circuit recognized in *Bonanno* that states have been held to be "persons" under RICO notwithstanding their Eleventh Amendment immunity from suit in the federal courts. *See Bonanno*, 879 F.2d at 25 (citing cases); *see also, Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312 (7th Cir.1985) (recognizing state agency, an entity

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[9] Pfizer held that foreign states are "persons" that can sue under the antitrust laws, *see* 15 U.S.C. § 15, notwithstanding that the prohibitions of those laws also apply to "persons" (thereby subjecting those who can sue under the antitrust laws to liability thereunder), *see, e.g.*, 15 U.S.C. § 1 ("Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony."); 15 U.S.C. §§ 2, 3, 8 ("Every person...."); 15 U.S.C. § 7 (defining "person"); 15 U.S.C. § 12 (defining "person"); 15 U.S.C. §§ 13, 13a, 14 ("It shall be unlawful for any person...."), and notwithstanding that foreign states ordinarily are not susceptible to suit in our courts. *See Pfizer*, 98 S.Ct. at 586; *cf.*, 98 S.Ct. at 592-93 ("Given that 'person' as used in the Clayton and Sherman Acts refers to both antitrust plaintiffs and defendants, the decision of Congress to include foreign corporations while omitting foreign sovereigns from the definition most likely reflects this differential susceptibility to suit.") (Burger, J. dissenting) (internal citation omitted).

possessing Eleventh Amendment immunity, as a "person" under RICO).

Given the close parallel between RICO and the anti-trust laws and the clear holding in Pfizer that foreign states may sue thereunder notwithstanding that the United States cannot, *see Pfizer*, 434 U.S. at 318, 98 S.Ct. 584, and for the reasons previously discussed, the Court finds that Canada is a person entitled to seek treble damages under § 1964(3).

G. Whether Canada has Suffered a Cognizable Injury Under RICO

Defendants next move to dismiss on the ground that the types of injuries claimed by Canada are not cognizable under RICO as injury to business or property. Canada responds that it sustained injury in the form of tax losses, increased law enforcement costs, and increased tobacco consumption as a direct result of Defendants' alleged scheme to avoid Canadian taxes and laws.

As mentioned supra at § II(B)(1) (p. 17), a RICO plaintiff only has standing if it can demonstrate that it sustained injury to "business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c); *see also Sedima*, 105 S.Ct. at 3285. This phrase contains two elements necessary to a RICO plaintiff's claim: (1) injury to business or property; and (2) proximate causation.

With respect to proximate cause, the Supreme Court has stated that a RICO plaintiff must demonstrate that it would not have sustained the injury but for defendant's violation of the statute and that such injury was proximately caused by defendant's violation, applying common law notions of proximate causation. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992); *See also Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 234 (2d Cir.1999), *cert. denied*, --- U.S. ----, 120 S.Ct. 799, 145 L.Ed.2d 673 (2000) ("Philip Morris"); *Moore v. PaineWeb-*

ber, Inc., 189 F.3d 165, 178 (2d Cir.1999) (Calabresi, C.J., concurring).

The difficulties of applying the concept of proximate cause were fully set forth by the Second Circuit in *Philip Morris*, *see* 191 F.3d at 234- 38. That case made clear that, to establish proximate cause, a plaintiff must prove: (1) direct injury, *see id.* at 235 ("direct injury is a key element for establishing proximate causation"); and (2) foreseeability. *See id.* at 236. Other factors may also play into the equation. *See id.* at 235-36.

1. Loss of Tax Revenues

Because the Court has dismissed that portion of Canada's claim seeking recovery of lost tax revenues as barred by the Revenue Rule, *see* discussion supra at II(B)(1), the Court need not analyze whether these claimed damages constitute injury to business or property or whether Defendants' alleged RICO violations proximately caused these injuries.

2. Increased and/or Continued Tobacco Consumption

In its Civil RICO statement, Canada lists "[i]ncreased tobacco consumption among its population, especially its youth" and "[c]ontinued tobacco consumption among existing smokers" as part of the injury to business or property it sustained as a result of Defendants' alleged RICO violations. Dkt. No. 11, pp. 57, 159. However, Canada falls to specify what harm it actually sustained as a result of any increased and/or continued tobacco consumption. It, therefore, is difficult to ascertain whether this claimed harm is injury to business or property. Moreover, even assuming this to be injury to business or property, any harm sustained by Canada as a result of increased and/or continued tobacco consumption is:

> entirely derivative of the harm suffered by [its citizens] as a result of using tobacco products. Without injury to the individual smokers, [Canada] would not have incurred any increased costs [or other such injuries as a result

> of increased and/or continued tobacco consumption].... Being purely contingent on harm to third parties [the individual smokers], these injuries are indirect. Consequently, because [D]efendants' alleged misconduct did not proximately cause the injuries alleged, [P]laintiff[ ] lack[s] standing to bring RICO claims against [D]efendants [on this ground].

Philip Morris, 191 F.3d at 239.

As in *Philip Morris*, a finding of a lack of proximate cause here with respect to increased and/or continued tobacco consumption fully comports with the policy considerations set forth by the Supreme Court in *Holmes*. *See* 112 S.Ct. at 1318. In *Holmes*, the Supreme Court recognized the following policy considerations behind requiring direct injury:

> [1] the less direct the injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors[;] ... [2] recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries[;] ... [and] [3] directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

112 S.Ct. at 1318 (internal citations omitted); *See also Philip Morris*, 191 F.3d at 239-241. For these reasons, any damages sustained by Canada as a result of increased and/or continued tobacco consumption purportedly caused by Defendants' alleged RICO violations are indirect and, thus, were not proximately caused by Defendants' actions. Accordingly, Canada

may not recover damages under § 1964(c) for these claimed injuries.

3. Increased Law Enforcement Costs

As part of its alleged injuries to business or property, Canada claims that it "[s]pent monies seeking to stop the smuggling and catch the wrongdoers." Dkt. No. 11, p. 159. Defendants move to dismiss this portion of the Complaint contending that increased law enforcement costs constitute non- recoverable sovereign injury (as opposed to commercial injury). Canada responds that Defendants' scheme to evade Canadian law directly and proximately caused the increased law enforcement costs and, thus, it may recover such costs.

The initial inquiry with respect to this claimed injury is whether it constitutes injury to "business or property." Under the Clayton Act, which, as previously discussed, served as a model for RICO, to state a claim a plaintiff must demonstrate a competitive injury. *See Bonanno*, 879 F.2d at 24. RICO differs from the Clayton Act, however, in that there is no requirement of competitive injury. *See Sedima*, 105 S.Ct. at 3285; *see also National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994) (Section 1964(c) does not require proof of an economic motive); *Phillips*, 771 F.2d at 314. As the *Sedima* Court stated:

> Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in § 1962(c), "an activity which RICO was designed to deter." Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

Sedima, 105 S.Ct. at 3285. In footnote 15, the *Sedima* Court explicitly stated that "[s]uch damages include, *but are not limited to*, ... competitive injury." *Sedima*, 105 S.Ct. at 3285 n. 15 (emphasis supplied).

Because Canada was compelled to increase law enforcement expenditures to combat Defendants' alleged smuggling operations, it appears that such expenses are compensable as injury to Canada's property. *See, e.g., Phillips*, 771 F.2d 312 (State Department of Revenue had standing under RICO to recover treble damages against retailer who filed fraudulent tax returns); *Marcos*, 862 F.2d at 1358 (Republic of the Philippines properly stated RICO claim for money allegedly fraudulently obtained from it). After all, Defendants' purported activities forced Canada to expend additional money, which, "of course, is a form of property." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S.Ct. 2326, 2330, 60 L.Ed.2d 931 (1979).

If the inquiry ended here, the Court would be inclined to allow Canada's claims for law enforcement costs to proceed. However, the analysis of whether Canada sustained a cognizable injury to business or property under RICO is complicated by the Second Circuit's decision in *Town of West Hartford*, 915 F.2d 92. *Town of West Hartford* involved somewhat similar damages to those sought by Canada herein (law enforcement costs). In that case, anti-abortion activists engaged in a series of acts designed to impede access to and shut down a medical facility that provided abortion services. To restore order to the area and provide for the general safety, the *Town of West Hartford* responded with approximately forty police officers, ambulance and paramedic teams with which it had contracted to provide services, and the fire department. The *Town of West Hartford* then commenced a RICO action against the anti-abortion activists seeking to recover for its reduced ability to respond to police and fire emergencies on two separate occasions, the impairment of its contract for paramedic services, having its police force oper-

ate in an unnecessary level of alertness, and overtime wage expenses which it would not otherwise have incurred. *See Town of West Hartford*, 915 F.2d 92.

Relying on *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972) and *Reiter*, 99 S.Ct. 2326, two cases involving the Clayton Act, the Second Circuit held that because these injuries (including the overtime expenses) were not injuries to a municipality as a party to a commercial transaction, they "do not fall within the ambit of section 1964(c)." *Town of West Hartford*, 915 F.2d at 104. Again noting the close similarity between the Clayton Act and RICO, the Second Circuit interpreted *Hawaii* to mean that governmental entities cannot recover for injuries to their general economy or their ability to carry out their functions. *See id.* at 103-04. Thus, pursuant to *Town of West Hartford*, where a municipality sues under RICO, it must allege injury to its business or property in its capacity "as a party to a commercial transaction." *Id.* at 104.

The *Hawaii* case, upon which the Second Circuit heavily relied in *Town of West Hartford*, involved an antitrust action (§ 4 of the Clayton Act) by the State of Hawaii seeking, among other things, damages for alleged monopolistic and price fixing activities in three capacities: (1) in its proprietary capacity for overcharges for petroleum products purchased by the state itself; (2) as *parens patrise* for similar overcharges paid by its citizens; and (3) as class representative for all purchasers in Hawaii for identical overcharges. *See Hawaii*, 92 S.Ct. at 887. The Court did not question the State's ability to recover for losses it directly sustained as a consumer of petroleum products. Instead, the issue before the Court was whether "the injury asserted by *Hawaii* in its *parens patrise* count is an injury to its 'business or property' [within the meaning of § 4 of the Clayton Act]." *Id.* at 890.

The Supreme Court held that "[l]ike the lower courts that have considered the meaning of the words 'business or property,' we conclude that they refer to commercial interests

or enterprises. When the State seeks damages for injuries to its commercial interests, it may sue under § 4. But where ... the State seeks damages for other injuries, it is not properly within the Clayton Act." *Id.*92 S.Ct. at 892.

Central to the Supreme Court's decision in *Hawaii* were some of the practical implications of permitting the State of Hawaii to recover on behalf of its citizens. *See Reiter*, 99 S.Ct. at 2332. The first concern was that of ascertaining damages. The Court stated that:

> Where the injury to the State occurs in its capacity as a consumer in the marketplace, through a "payment of money wrongfully induced," *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 27 S.Ct. 65,66, 51 L.Ed. 241 (1906), damages are established by the amount of the overcharge. Under § 4, courts will not go beyond the fact of this injury to determine whether the victim of the overcharge has partially recouped its loss in some other way, even though a State, for example, may ultimately recoup some part of the overcharge through increased taxes paid by the seller. *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 2229, 20 L.Ed.2d 1231 (1968). Measurement of an injury to the general economy, on the other hand, necessarily involves an examination of the impact of a restraint of trade upon every variable that affects the State's economic health – a task extremely difficult, "in the real economic world rather than an economist's hypothetical model." *Id.*, 88 S.Ct. at 2231. The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in

> damages for all injuries that might conceivably be traced to an antitrust violation.

Hawaii, 92 S.Ct. at 891-92 n. 14.

The second concern dealt with the apportionment of damages and potential for duplicative recoveries. *See Reiter*, 99 S.Ct. at 2332 ("A central premise of our holding in *Hawaii* was concern over duplicative recoveries"). Because every individual who suffered damage to business or property by reason of an antitrust violation could seek redress under § 4, allowing the state to recover for these same damages "would open the door to duplicative recoveries." *Hawaii*, 92 S.Ct. at 892. In this regard, the Court stated that:

> A large and ultimately indeterminable part of the injury to the "general economy," as it is measured by economists, is no more than a reflection of injuries to the "business or property" of consumers, for which they may recover themselves under § 4. Even the most lengthy and expensive trial could not in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State. At the very least, if the latter type of injury is to be compensable under the antitrust laws, we should insist upon a clear expression of a congressional purpose to make it so, and no such expression is to be found in § 4 of the Clayton Act.

92 S.Ct. at 892. For these reasons, the Supreme Court refused to allow Hawaii to recover under § 4 of the Clayton Act for injuries other than those to its commercial interests.

Several years after the *Hawaii* decision, the Supreme Court decided *Reiter*, in which the Court held that consumers of retail goods, and not just injured business entities, have

standing to sue under § 4 of the Clayton Act, thereby broadening the Clayton Act's standing requirement. *See Reiter*, 99 S.Ct. at 2332. Later, the Supreme Court decided *Sedima*, in which, as noted, it adopted a broad reading of RICO's injury requirement. *See Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 3285-86, 87 L.Ed.2d 346 (1985); *see also Sasso*, 215 F.3d 283, 290 (noting that § 1964(c) should be interpreted broadly). Importantly, in *Sedima*, which involved private litigants, the Supreme Court noted that RICO damages are not limited to those resulting from competitive injury. *See id.; cf Sedima*, 105 S.Ct. at 3289, 3290 (1985) (Marshall, Brennan, Blackmun, and Powell, JJ., dissenting) ("The only way to give effect to Congress' concern is to require that plaintiffs plead and prove that they suffered RICO injury--injury to their competitive, investment, or other business interests").

The Supreme Court's wording in Hawaii requiring "damages for injuries to its commercial interests" precluded the types of damages sought in *Town of West Hartford.* However, the reasons for the holding in *Hawaii* seemingly did not apply to the facts in that case. The *Town of West Hartford* sought to recover, at least in part, for discrete injuries to itself – over $42,000 in overtime wage expenses. Unlike in *Hawaii*, the *Town of West Hartford* itself actually sustained these injuries, they were readily ascertainable (presumably, one could simply refer to the Town's payroll records), and there was no possibility of duplicative recoveries because no other individuals or entities would be able to recover those damages sustained by the Town.

Notwithstanding these distinctions, the extension of the liberal RICO injury requirement beyond competitive injury, and the difference between the injury requirement in RICO and § 4 of the Clayton Act, *See, e.g., Bieter Co. v. Blomquist*, 987 F.2d 1319, 1327 (8th Cir.), *cert. denied*, 510 U.S. 823, 114 S.Ct. 81, 126 L.Ed.2d 50 (1993); *Bennett v. Berg*, 685 F.2d 1053, 1059 (8th Cir.1982), *cert. denied*, 464

U.S. 1008, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983); *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 792 F.2d 341, 354 (3d Cir.1986), *aff'd*, 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987); *Phillips*, 771 F.2d at 316, the Second Circuit held that the injuries sustained by the *Town of West Hartford* constituted non-cognizable injury to the Town's general economic well-being and/or its ability to carry out its functions. *See Town of West Hartford*, 915 F.2d at 104. In short, *Town of West Hartford* requires injury to the government's commercial interests in RICO claims. The Court has been unable to find any Supreme Court or Second Circuit cases that have overruled, abrogated, or otherwise departed from this holding to which this Court is bound.

Here, like in *Town of West Hartford*, Canada is seeking to recover increased law enforcement costs. The Court agrees with Canada that these costs could readily be found to be a direct and proximate cause of Defendants' alleged unlawful activity, thereby satisfying the causation requirement. Moreover, Canada has sustained distinct economic harm allegedly as a result of Defendants' activities for which no other person or entity could recover. Nevertheless, the holding in *Town of West Hartford* compels the Court to conclude that such costs do not constitute a cognizable RICO injury to Canada as a party to a commercial transaction, but, rather, constitute injury to Canada's general economy and its ability to carry out its functions. Because the cost of law enforcement pertains to general municipal functions rather than commercial activities, under *Town of West Hartford*, Canada may not recover for such damages under RICO. Absent any cognizable injury in fact, Canada does not have standing to assert the instant RICO claims.

4. Injunctive Relief

Aside from its claim for monetary damages, Canada also seeks various forms of injunctive relief. Section 1964(c) limits private plaintiffs to damages and does not provide a basis upon which it may seek injunctive relief. *See* 18 U.S.C.

§ 1964(c); *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir.1986), *cert. denied*, 479 U.S. 1103, 107 S.Ct. 1336, 94 L.Ed.2d 187 (1987); *Town of West Hartford v. Operation Rescue*, 726 F.Supp. 371, 376-78, *rev'd on other grounds*, 915 F.2d 92.

H. Supplemental Jurisdiction

Having dismissed Canada's federal causes of action at this early stage of the litigation, the Court declines to exercise supplemental jurisdiction over the common law fraud action. *See* 28 U.S.C. § 1367(c)(3); *see also Shenandoah v. United States Dep't of the Interior*, 159 F.3d 708, 714 (2d Cir.1998).[10]

III. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss the Complaint in its entirety are GRANTED.

IT IS SO ORDERED.

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[10] Jurisdiction is lacking under 28 U.S.C. § 1332 because there is not complete diversity – on the one side is Canada and on the other is a Canadian corporation (RJR-Macdonald). *See Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 789 (2d Cir.1980) ("[T]he fact that alien parties [are] present on both sides ... destroy[s] complete diversity"), *cert. denied*, 449 U.S. 1080, 101 S.Ct. 863, 66 L.Ed.2d 804 (1981); *see* also 28 U.S.C. § 1332(a).

APPENDIX C

FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 Foley Square
New York 10007

Roseann B. Mackechnie
Clerk

[Entered: December 12, 2001]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of December two thousand one.

ATTY GENERAL OF CANADA,

Plaintiff-Appellant,

v.

R.J. REYNOLDS TOBACCO HOLDINGS, INC., R.J. REYNOLDS TOBACCO COMPANY, RJ REYNOLDS TABACCO INTERNATIONAL, INC., RJY-MACDONALD, INC., RJ REYNOLDS TOBACCO COMPANY, PR, NORTHERN BRANDS INTERNATION, INC. and CANADIAN TOBACCO MANUFACTURERS COUNCIL,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Atty. General of Canada.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has required that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, CLERK

By: /s/ Arthur Heller
Arthur Heller
Administrative Attorney

APPENDIX D

UNITED STATES CODE
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I – CRIMES
CHAPTER 96 – RACETEERING INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of

citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bear-

ing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so

designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

UNITED STATES CODE
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I – CRIMES
CHAPTER 96 – RACETEERING INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged

in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

UNITED STATES CODE
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I – CRIMES
CHAPTER 96 – RACETEERING INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to estab-

lish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

UNITED STATES CODE
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I – CRIMES
CHAPTER 63 – MAIL FRAUD

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

UNITED STATES CODE
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I – CRIMES
CHAPTER 63 – MAIL FRAUD

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

(2)

Supreme Court U.S.
FILED
APR 10 2002
OFFICE OF THE CLERK

No. 01-1317

IN THE

Supreme Court of the United States

THE ATTORNEY GENERAL OF CANADA,

Petitioner,

v.

R.J. REYNOLDS TOBACCO HOLDINGS, INC.; R.J. REYNOLDS TOBACCO COMPANY; R.J. REYNOLDS TOBACCO INTERNATIONAL, INC.; RJR-MACDONALD, INC.; R.J. REYNOLDS TOBACCO COMPANY, PR; NORTHERN BRANDS INTERNATIONAL, INC.; AND CANADIAN TOBACCO MANUFACTURERS COUNCIL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

In permitting treble-damages actions by "person[s]" for injuries to their "business or property" caused by racketeering (18 U.S.C. § 1964(c)), does RICO abrogate the common-law revenue rule, which has long barred one country from directly or indirectly enforcing its tax laws in the courts of another country?

RULE 29.6 STATEMENT

1. R.J. Reynolds Tobacco Holdings, Inc.:

(A) does not have a parent company and the following publicly-held companies own 10% or more of the corporation's stock: Fidelity Management, and Capital Research and Management Company; and

(B) is the parent corporation for R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., R.J. Reynolds Tobacco Company, PR, and Northern Brands International, Inc. No publicly-held company owns 10% or more of the stock of any of these subsidiaries.

2. RJR-MacDonald, Inc. (currently JTI-MacDonald Corp.) has a parent corporation, Japan Tobacco Inc., and no publicly-held company owns 10% or more of Japan Tobacco Inc.'s stock.

3. The Canadian Tobacco Manufacturers Council ("CTMC") is a non-profit corporation with its principal office in Ottawa, Canada that does not sell stock to the public. The members of the CTMC are Imperial Tobacco Ltd., Rothmans, Benson & Hedges, Inc., and JTI-MacDonald Corp.

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STATEMENT

In their decisions below, both lower courts rejected an attempt by the Attorney General of Canada to use RICO to collect three times the tax revenues Canada allegedly lost as a result of a scheme to smuggle cigarettes into the country. The court's opinion joined an unbroken line of decisions over the past 200 years in which courts in this country and abroad have applied the venerable "revenue rule" to bar one country from enforcing its tax laws, directly or indirectly, in the courts of another country. The Attorney General concedes that there is no circuit conflict over the issue. And he cannot dispute that Canada's own judiciary would invoke—and has previously invoked—the revenue rule to bar a suit by the United States to enforce American tax laws in Canadian courts.

Against this backdrop, petitioner asks the Court to rule, thirty-two years after RICO was enacted, that Congress intended to abrogate the revenue rule when it passed this anti-racketeering statute. If true, this theory of abrogation would allow any country, whether friend or foe, to ignore its own tax-collection laws and to avoid the trouble of negotiating a reciprocal tax-collection treaty with our government simply by invoking RICO in American courts to recover treble taxes plus attorney fees. But as the Court has made abundantly clear and as the lower courts correctly recognized, the general words of RICO do not customarily alter common-law principles in existence when the statute was written. *Beck v. Prupis*, 529 U.S. 494 (2000); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992). In the absence of any clear direction by Congress to abrogate the revenue rule (or for that matter any mention of the rule in the legislative debates over RICO), and in the absence of any conflict in the courts of appeals (or for that matter any foreign courts), no cognizable basis exists for this Court to be "drawn into issues and disputes of foreign relations policy that are assigned to—and better handled by—the political branches of government." Pet. App. A18-19.

I. FACTS.

In 1991, Canada doubled its taxes on tobacco products. Pet. App. A3. Soon thereafter, it realized that smugglers were bringing cigarettes into the country through the St. Regis/Akwesasne Indian Reservation on the New York-Canadian border in an effort to avoid these taxes. *Id.* at A3.

At the time Canada discovered this alleged tax-evasion scheme, as today, it had a variety of tax-enforcement provisions available to address this type of problem. These included numerous civil and criminal laws as well as a 1980 American-Canadian Treaty and a 1995 Protocol between the countries designed to facilitate cross-border tax collection of certain final tax judgments. *See* Section 240(1), The Canadian Excise Act, R.S.C., 1985; Canadian Criminal Code, Section 465(1)(c); Convention Between the United States of America and Canada With Respect to Taxes on Income and Capital, Sept. 26, 1980, U.S.-Can., T.I.A.S. No. 11087; Protocol Amending the Convention Between the United States of America and Canada With Respect to Taxes on Income and Capital, Nov. 9, 1995, U.S.-Can., Art. XXVI A(2), 1 Tax Treaties (CCH) ¶ 1901.261, at 21,005-26 (hereinafter "U.S.-Canada Income Tax Treaty (1995 Protocol"); s*ee also* Appendix A (summarizing Canadian and U.S. treaties and laws that address smuggling and related cross-border criminal activities).

Rather than invoke these laws and treaties and rather than use its own courts to recover these tax revenues, Canada tried something different. Its Attorney General filed a civil action for *treble* damages in an American court seeking to recover the allegedly lost Canadian taxes under an American law—the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*.

In doing so, the Attorney General filed the action in federal court in the Northern District of New York, and named a variety of international defendants: RJR-MacDonald, Inc.,

a Canadian company; the Canadian Tobacco Manufacturers Council, a trade association based in Canada; and several other companies—Northern Brands International, Inc., R.J. Reynolds Tobacco International, Inc., R.J. Reynolds Tobacco Holdings, Inc., R.J. Reynolds Tobacco Company, and R.J. Reynolds Tobacco Company, PR. According to the complaint, the parties responsible for the alleged tax evasion were not just the cigarette smugglers themselves but the distributors of the cigarettes and the manufacturers as well. As for damages, each of the Attorney General's claims stemmed from a tax-related injury, ranging from (1) lost revenue due to the evasion of tobacco duties and taxes to (2) law-enforcement costs incurred to stop the alleged smuggling.

In response, all of the defendants moved to dismiss the complaint as a matter of law. They raised a variety of legal defenses, including the claim that the RICO treble-damages provision (18 U.S.C. § 1964(c)) does not abrogate the long-established revenue rule, which bars one country from directly or indirectly collecting its taxes in the courts of another country. The Canadian Tobacco Manufacturers Council also separately moved to dismiss on personal-jurisdiction and forum-non-conveniens grounds, and continues to object to the federal courts' jurisdiction over it.

II. THE DECISIONS BELOW.

The district court granted the motion on revenue-rule grounds. "Enforcing foreign revenue laws," it concluded, "is precisely the type of meddling in foreign affairs the Revenue Rule forbids." Pet. App. B16. Because the Canadian Attorney General's claim would have required the court to adjudicate and enforce foreign tax claims both directly and indirectly, it determined that the revenue rule applied. *Id.* at B13. And because the general language of RICO did not abrogate this common-law principle, the court reasoned that the rule barred this claim: "[T]his Court is precluded from affording the Canadian government an alternative mechanism *not expressly*

authorized by the legislative and/or executive branches of government—those branches particularly responsible for establishing and conducting international relations—by which it may recoup lost tax revenues in the courts of the United States." Pet. App. B17 (emphasis added). Nor, the court added, did international tax-collection treaties bolster the claim. To the contrary: "[W]hile the [United States-Canadian Income Tax Convention] may abrogate the Revenue Rule insofar as the two countries may recognize one another's final judgments (or their equivalents), it does not go so far as to eliminate the Rule with respect to unadjudicated or otherwise non-final revenue claims." *Id.* at B12.

The Second Circuit affirmed. "The revenue rule," the court observed, "is a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns." *Id.* at A10. It then determined that an "[e]xamination of both the policies underlying the revenue rule, and the rule's congruence with the international tax policies pursued by the political branches of our government, supports the conclusion that the revenue rule is applicable to the particular facts of the case at hand." *Id.*

Discerning nothing in the text, purpose or legislative history of RICO that Congress meant suddenly to abrogate the revenue rule when it enacted the provision in 1970, the appellate court concluded that RICO did not alter the rule. Nor was the court persuaded by the alternative claim that the revenue rule could be evaded simply by invoking the law of the home forum—be it American fraud law, breach-of-contract law, tort law, or (as here) RICO law. "We are not persuaded by Canada's arguments that this is an action brought solely under United States law, and not a claim for Canadian taxes. On the contrary, Canada seeks to use the United States law to enforce, both directly and indirectly, its tax laws." *Id.* at A48-50. Recognizing that this exception would swallow the rule

and that no court at all events had ever recognized such an exception, the court thus rejected this alternative theory. *Id.*

In dissent, Judge Calabresi acknowledged that he "fully share[s] the majority's concerns that applying civil RICO to violations of foreign tax law may be harmful to American trade interests and to American companies doing business abroad." Pet. App. A65. But he nonetheless believed, among other things, that the court's holding conflicted with Second Circuit precedent. *See id.* at A58. When the Attorney General sought rehearing *en banc*, however, not a single judge on the Second Circuit voted for the petition. *Id.* at C2.

REASONS FOR DENYING THE WRIT

The petition fails to satisfy the customary prerequisites for review. Not only does the decision below hew closely to established revenue-rule and RICO decisions, but it also does not conflict with a single decision of any lower court or of this Court. Indeed, to our knowledge, the description of the revenue rule by the Second Circuit—that courts will not enter the "'forbidden waters'" of assessing the validity and applicability of foreign tax laws (Pet App. A8-A9)—does not conflict with a single decision of any court, foreign or domestic, over the last two hundred years. This universality of opinion, including decisions from Canada's own courts, not only confirms the firmly-entrenched nature of the rule, but also illustrates the dramatic impact on foreign policy that a sudden change in this practice could have. On this historical record, the courts below correctly resisted being "drawn into issues and disputes of foreign relations policy" (Pet. App. A18-19) by concluding that Congress, which said nothing about the revenue rule in RICO or its legislative history, did not alter this age-old common-law rule. *See Beck v. Prupis*, 529 U.S. 494, 503 (2000); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992).

Canada's own actions, moreover, disprove the other contention in the petition—that the matter is otherwise

sufficiently pressing to warrant the Court's time. The country has never enacted a treble-damages remedy under its own laws for tax evasion; it has never negotiated a tax treaty with the United States providing for such damages; and it has not even attempted to collect the allegedly lost taxes under its own laws and under existing American-Canadian treaties. Under these circumstances, the Canadian Attorney General cannot credibly claim that this Court (rather than Canadian courts or Canadian law enforcement) should be the first governmental entity to redress these alleged injuries. The writ should be denied.

I. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY OTHER LOWER-COURT DECISIONS.

The first flaw in the petition is that it fails to satisfy the first explanation for granting review. Neither in the court of appeals' decision, in the dissenting opinion, nor in the petition itself does anyone allege that the Second Circuit's decision conflicts with a single lower-court decision from any other federal circuit or state court. Nor could any such claim be made. The Second Circuit's decision simply does not conflict with other lower-court decisions, to say nothing of decisions from foreign courts. The reason is straightforward: Imposing and collecting taxes are quintessentially sovereign acts. As such, the powers do not extend beyond the borders of one country into those of another, and as such no court has ever permitted one sovereign to collect its lost revenues in the courts of another. For this reason alone, the petition should be denied. *Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. *See* this Court's Rule 10.1.").

II. AS CANADA'S OWN ACTIONS ATTEST, THE QUESTION PRESENTED DOES NOT HAVE THE IMPORTANCE THAT THE ATTORNEY GENERAL ASCRIBES TO IT.

Conspicuously lacking a lower-court conflict, petitioner argues (Pet. 16) that the Court has "repeatedly granted the Writ, even in the absence of a circuit conflict, in cases involving the rights of foreign nations to proceed . . . in the courts of the United States." In making this argument, the Attorney General initially cites (*id.*) a series of Supreme Court cases that purportedly lacked lower-court conflicts and that involved foreign nations or foreign commercial interests. But only one of the cases, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), has any bearing on the Court's certiorari practices over the last 16 years, and it *did* involve a lower-court conflict. *See Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 55-56 (1st Cir. 1999) (citing lower-court split over "challenges to . . . laws targeting specific foreign states" and noting further that "[c]ourts have also split" in interpreting related buy-American statutes). While it is difficult to argue in any setting that prior certiorari decisions recommend review in a later case, that argument is particularly unpersuasive here.

The Attorney General attempts to shore up this contention by suggesting (Pet. 16) that the question is important in view of the relationship between his country and the United States. But it was precisely the nature of the American-Canadian relationship and the risk of cross-border smuggling in the first instance that prompted Canada to enact numerous laws designed to prevent and punish alleged tax avoidance of this sort, then to negotiate an American-Canadian Treaty and Protocol designed specifically to address cross-border tax-collection matters. *See* Appendix A. Through it all, however, Canada never enacted a treble-damages remedy for tax avoidance under its own laws, never negotiated a tax treaty with the United States that would authorize this tax-

collection effort, and has not even attempted to collect the lost taxes under the Canadian laws and American-Canadian treaties that do exist. As Canada's own actions demonstrate, the claim that the Second Circuit's interpretation of RICO's treble-damages provision suddenly demands this Court's review rings hollow.

Also unavailing is the Attorney General's related suggestion (Pet. 16) that this Court should supplement these Canadian remedies with a RICO claim because Canada is a "friendly foreign nation." One of the core functions of the revenue rule is to avoid asking courts—whether the Second Circuit or this Court —to determine which nations are friendly and which are not. Such requests, as the Second Circuit correctly concluded, "are assigned to—and better handled by—the political branches of government." Pet. App. A19. Nothing in RICO itself, moreover, authorizes courts to make special allowances for claims by "friendly" foreign countries or for that matter provides any criteria for ascertaining which countries are sufficiently friendly to warrant a remedy that the political branches of their governments have chosen not to confer by treaty.

Lastly, the availability of remedies under Canadian law and extant American-Canadian treaties shows why the Attorney General cannot credibly claim that the decisions of the lower courts leave Canada without other means to address these issues. Not only may Canada still enforce existing laws in its own courts regarding these claims, but it always retains the option of negotiating a treaty or protocol with the United States that would allow access to American courts to recover its taxes. Though Canada has entered a comprehensive tax treaty with the United States that addresses tax collection assistance (*see* Appendix A), there is no dispute that the Treaty and Protocol do not authorize this claim. As the Second Circuit found, "[b]y permitting such a claim to go forward, we would be ignoring and undermining the treaty negotiation process and the clearly expressed views of the

political branches of the United States." Pet. App. A34. Under these circumstances, the Attorney General's petition for relief is more appropriately addressed to the political branches than to this Court. Perhaps appreciating these factors, one of Canada's provinces did not even seek Supreme Court review in 1979 when the Ninth Circuit rejected its effort to collect lost tax revenues in American courts. *See Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1165 (9th Cir. 1979).

III. THE SECOND CIRCUIT'S DECISION IS CORRECT ON THE MERITS.

Unable to establish the customary grounds for seeking review, the Attorney General devotes most of his petition to arguing the merits of the two lower-court decisions against him. But even if this were a traditional basis for seeking certiorari (which it is not), the argument fails on its own terms. The Second Circuit correctly followed this Court's general interpretive canons as well as their specific application to RICO. And because petitioner does not allege, much less show, that the holding below conflicts with a single decision of this Court, this rarely-sufficient ground for granting the writ also comes up short. *See Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

A. In Enacting RICO, Congress Did Not Abrogate The Time-Honored Revenue Rule.

1. The Revenue Rule Was Well Established Long Before Congress Passed RICO.

In 1970, when Congress passed RICO, the revenue rule was as deeply embedded in the common law as it was widespread. Not only had every country to consider the rule

embraced it, including both the United States and Canada, but the rule also formed a pertinent background principle to numerous American tax-collection treaties.

In the United States, it "has long been a general rule that one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim." *United States v. First Nat'l City Bank*, 321 F.2d 14, 23-24 (2d Cir. 1963), *rev'd on other grounds*, 379 U.S. 378 (1965). The revenue rule "has become so well recognized" that when Canada tried to enforce a tax claim in this country in the 1970s, the Ninth Circuit observed (in rejecting the claim) "that this appears to be the first time that a foreign nation has sought to enforce a tax judgment in the courts of the United States." *Gilbertson*, 597 F.2d at 1164 n.7.

This Court, too, has recognized the "principle enunciated in federal and state cases that a court need not give effect to the penal or revenue laws of foreign countries . . . ." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-14 (1964); *see also Huntington v. Attrill*, 146 U.S. 657, 671 (1892) (federal courts may not entertain "suits . . . for the recovery of pecuniary penalties for any violation of statutes for the protection of [a foreign nation's] revenue"). Other countries, including Canada itself, have embraced this "ancient rule" as well: "[F]oreign states cannot directly or indirectly enforce their tax claims in our courts. . . ." *United States v. Harden*, [1963] S.C.R. 366, 370-71 (Can. 1963). Indeed, the revenue rule "has never been challenged successfully in an international context." Hans W. Baade, *The Operation of Foreign Public Law*, 30 Tex. Int'l L.J. 429, 482 (1995).

In applying the revenue rule, the courts have given it force in at least three settings, among others. It applies when one sovereign attempts to enforce a tax *judgment* in the courts of another. *See Gilbertson*, 597 F.2d at 1163 n.1. It applies when one sovereign attempts to use another country's courts to collect *unadjudicated* tax claims. *See Gov't of India v.*

Taylor, [1955] A.C. 491 (H.L. 1955). And it applies when the action is *indirectly* "a suit brought for the purpose of collecting the debts of a foreign revenue." *See Peter Buchanan Ltd. v. McVey*, [1954] I.R. 89 (Ir. H. Ct. 1950), *aff'd*, [1954] I.R. 89, 115 (Ir. S.Ct. 1951).

In all three settings, the rationale for barring these extra-territorial claims and for steering clear of these "forbidden waters" is the same. Pet. App. B17. Namely, the unilateral enforcement of foreign tax claims, like foreign penal laws, in another nation's courts risks infringing bedrock principles of national sovereignty that are singularly appropriate for political rather than judicial resolution. "[A] claim for taxes is but an extension of the sovereign power which imposed the taxes, and . . . an assertion of sovereign authority by one State within the territory of another . . . is (treaty or convention apart) contrary to all concepts of independent sovereignties." *Gov't of India v. Taylor*, [1955] A.C. at 511. The "presume[d] invalidity" of foreign revenue laws thus stems from "the desire to avoid embarrassing another state by scrutinizing its penal and revenue laws" in the courts of another. *Sabbatino*, 376 U.S. at 437.

Nor, contrary to petitioner's suggestion (Pet. 12-15), has this principle required countries to abandon efforts to stop cross-border tax evasion and smuggling. One nation after another has responded to this limitation on the judicial power in at least two ways. First, they have entered into mutually advantageous executive-branch treaties with other sovereigns to ensure that this kind of tax avoidance does not go unregulated. *See First Nat'l City Bank*, 321 F.2d at 24. Thus, while "the international rule with regard to the non-enforcement of revenue and penal laws is absolute," the "revenue laws may in the future be modified by international convention." *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, [1986] A.C. 368, 428 (H.L. 1986). Proving the point, the United States has entered into tax treaties with sixty-one countries, with collection assistance

provisions ranging from the relatively generous assistance given Canada to none at all. *See, e.g.*, U.S.-Canada Income Tax Treaty (1995 Protocol) (permits tax-collection assistance for claims that have been "finally determined" by proceedings in the taxing sovereign's own courts). Second, countries have relied on their own courts to enforce their own civil and criminal laws to collect taxes and prevent smuggling. *See* Canadian Excise Act, R.S.C., 1985, Sec. 240(1). Notably, no claim has been made here that the Canadian Attorney General lacks remedies in Canadian courts against these defendants.

2. RICO Does Not Abrogate This Common-Law Rule.

As the Second Circuit recognized, courts do not lightly impute to Congress a desire to abrogate common-law doctrines. "[W]here a common-law principle is well established," this Court repeatedly has said, "the courts may take it as [a] given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (internal quotation omitted). The Court, moreover, has specifically applied this principle in the context of construing RICO's general terms. *See, e.g., Beck*, 529 U.S. at 504 (construing RICO not to abrogate "well-established common-law civil conspiracy principles"); *Holmes*, 503 U.S. at 267-70 (construing RICO not to abrogate common-law proximate cause requirements).

In the face of these precedents, both lower courts properly recognized that the anti-racketeering provisions of RICO could not be read as a directive to require courts suddenly to entertain tax-evasion claims brought by foreign sovereigns. Indeed, in view of the long-established history of judicial refusal to enforce other countries' tax laws and of executive-branch efforts to negotiate tax-collection treaties, it would have been exceedingly unusual for Congress suddenly

to abrogate the rule when it enacted RICO in 1970. And it would have been doubly so to erect a treble-damages remedy in its stead. Not only would such a law have eliminated more than two centuries of precedent and rendered all but irrelevant countless international tax treaties, but it also invariably would have made American courts the tax-collection capital of the world.

Yet RICO, by its terms, did no such thing. The statute merely authorizes a treble-damages action for injuries to a "person" in "his" or her "business or property" caused by racketeering violations. 18 U.S.C. § 1964(c). It says nothing about authorizing foreign governments to enter this country to collect their lost tax revenues. Nor, throughout the extensive legislative debates over RICO, was a single word mentioned about the revenue rule, to say nothing of abrogating the rule. All told, the court of appeals' analysis of the words, context, history and common-law backdrop of section 1964(c), together with this Court's relevant RICO decisions, reached the only tenable conclusion available. That thoughtful, comprehensive and ultimately correct analysis does not warrant review.

B. The Revenue Rule Applies To Efforts To Use American Fraud Law To Collect Foreign Taxes.

The Attorney General all but ignores this foundational basis for the lower court's decision. He does not deny that federal statutes, and particularly generally-worded statutes, must be read against the common-law tradition in which they were written. And he does not deny that the revenue rule is just such a common-law doctrine. Instead, he attempts (Pet. 9-11) to carve out an exception to the revenue rule—not recognized in 1970 and not recognized at any time since—under which the rule would be inapplicable when the foreign nation purports to rely, in part, on the law of the home state's forum in collecting its taxes.

The argument as an initial matter misapprehends the revenue rule. The rule historically has limited direct *and* indirect attempts to enforce foreign revenue laws—as the following decisions illustrate. In *Banco Do Brasil, S.A. v. A.C. Israel Commodity Co.*, 190 N.E.2d 235 (N.Y. 1963), the New York Court of Appeals found that Brazil could not bring a fraud action governed by New York law against an American coffee importer for a conspiracy to circumvent foreign exchange regulations. The Court found that Brazil was "seeking, by use of an action for conspiracy to defraud, to enforce what is clearly a revenue law." *Id.* at 237. Like Canada, Brazil attempted to use American law and American courts to recover damages stemming from violations of its revenue law, and like the Second Circuit here the court rejected the claim. *Id.*

The same was true in *Moore v. Mitchell*, 30 F.2d 600 (2d Cir. 1929), *aff'd*, 281 U.S. 18 (1930). There, an Indiana official sought to recover back taxes from the executors of an estate in a federal district court located in New York. *Id.* at 603. In doing so, the official brought the claims not under Indiana law, *see id.*, but under "the law of New York." *Id.* As here, the court of appeals rejected this cross-jurisdictional tax collection effort, holding that the Indiana tax collector could not enforce Indiana's tax laws indirectly in New York courts under New York law. *See id.* at 604. *Cf. Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277-80 (1935) (while the Supreme Court later determined that the Full Faith and Credit Clause requires one State to recognize the tax judgment of another State, it observed that the Clause does not apply to foreign countries, which are "free to ignore obligations created under the laws or by the judicial proceedings of the others").

No less significantly, the Attorney General's attempt to restrict the reach of the revenue rule ignores the teachings of his own Supreme Court. In *United States v. Harden*, [1963] S.C.R. at 371, the Canadian Supreme Court foiled an effort by the United States to enforce an American tax-collection

judgment in a Canadian court against a Canadian resident. As in this case, the United States did not try to enforce the foreign tax judgment directly but sought to do so indirectly by purporting to enforce an agreement—the tax settlement—under a breach-of-contract theory. *See id.* (plaintiff's argument was that "the claim asserted was simply for the performance of an agreement, made for good consideration"). The court, however, rejected this end run around the revenue rule, holding—for reasons similar to those offered by the Second Circuit here—that "[w]e are concerned not with form but with substance . . . . The nature of the liability is not altered. It is a liability to pay income tax . . . . [F]oreign States cannot directly or indirectly enforce their tax claims in our courts. . . . " *Id. See also* 1 Dicey & Morris, *The Conflict of Laws* 91 (13th ed. 2000) ("Indirect enforcement occurs where the foreign State (or its nominee) in form seeks a remedy, *not based on the foreign rule in question*, but which in substance is designed to give it extra-territorial effect . . . .") (emphasis added); *QRS 1 APS v. Frandsen*, 3 All E.R. 289 (C.A. 1999), 1999 WL 477337 (Danish companies suing under English negligence theories could not pursue action in English courts as the claims, "in substance, . . . involve[d] the indirect enforcement of Denmark's revenue law"); *Peter Buchanan Ltd. v. McVey,* [1954] I.R. 89 (Ir. H. Ct. 1950) (barring a party in Irish court who was asserting an Irish fraud theory from relying indirectly on Scottish revenue laws to obtain relief).

Not just precedent, but common sense as well, defeats the Attorney General's novel theory. As these courts appreciated and as the Second Circuit recognized, petitioner's innovation has no cognizable limit. For it invariably will be the case that an effort to recover lost taxes may be converted into a claim for breach of contract, tort, fraud, or some other tax-recovery theory masquerading as a domestic law of the home forum. So long as the measure of damages is lost revenues or law-enforcement costs related to them, the revenue rule applies. In the end, Canada's own Supreme

Court put it best: The rule bars one country from "directly or indirectly" enforcing the tax claims of another country. *Harden*, *supra*, at 371. That was true in *Harden*; it is true here.

C. The Attorney General Errs In Claiming That The Second Circuit's Decision Will Interfere With Traditional Tax-Collection Efforts.

Petitioner also claims (Pet. 12-15) that the Second Circuit's decision will undermine international tax-collection efforts. In truth, however, the Attorney General has it exactly backwards. The sudden repeal of the revenue rule not only would open American courts to an onslaught of foreign tax claims but also would undermine the executive branch's ability to negotiate tax treaties with other nations.

The American courts' acceptance of the revenue rule stems from core separation-of-power requirements, which allow the political branches to determine whether, when and how U.S. government instrumentalities may be used to assist foreign governments in the collection of their taxes. Permitting claims like this would interfere with the authority of the political branches of government to address the enforcement of foreign revenue laws through international treaties.

In the case of Canada, moreover, the United States has specifically addressed mutual assistance in collecting revenue claims in recent amendments to the U.S.-Canada Convention With Respect to Taxes on Income and Capital. *See* Income Tax Treaty (1995 Protocol); *see also* Appendix A. This assistance is limited in a number of ways, however, reflecting the considered policy judgment of the political branches of each government. *See* Pet. App. A28-34. Canada is one of only five countries (including France, Netherlands, Denmark, and Sweden) with whom the United States has agreed to provide general assistance in collecting tax judgments. And

all of these treaties (1) require final determinations of liability in the requesting country, and (2) expressly exclude U.S. assistance in the collection of foreign taxes from U.S. citizens or corporations. *See* Pet. App. A21-28.

In bringing this lawsuit, the Attorney General chose to ignore the 1995 Protocol. Had the lower courts permitted a RICO treble-damages remedy here, they would have given Canada—and every other foreign sovereign (friendly or not) —a powerful incentive to pursue an American litigation remedy to their tax disputes rather than take the steps necessary either to make use of the collection processes established by treaty or to re-negotiate the applicable treaty. Canada and other foreign nations in short would have no tenable reason to negotiate reciprocal tax collection assistance rights with the United States if our courts and our legal theories were already available to collect their taxes. In the final analysis, petitioner could not be more mistaken in arguing (Pet. 9) that "[t]here is no foreign policy reason" to prevent its claims.

IV. THIS CASE PRESENTS A POOR VEHICLE FOR REVIEWING THESE ISSUES.

Petitioner, lastly, errs in claiming (Pet. 17) that this case presents "an excellent vehicle" for review. For one, a case rarely presents a good vehicle for review in the absence of a split in lower-court decisions. The percolation process by itself illustrates which cases are good vehicles and which are not, allows other lower courts to weigh in on the issue, and ultimately ensures (to quote petitioner (Pet. 17)) that the "genie" is not let out of the bottle prematurely.

For another, respondents have raised a host of additional grounds for dismissing the Attorney General's claims as a matter of law, not one of which the Second Circuit needed to reach in light of its conclusion that RICO did not abrogate the revenue rule. In the lower courts, respondents argued that the extension of RICO to foreign tax-collection claims would

violate the Constitution's separation-of-power requirements, would (at a minimum) trigger constitutional-avoidance considerations, would raise an impermissible political question, and would implicate this Court's sovereign-immunity decisions since petitioner's theory of relief necessarily would permit money-damages claims by *and against* foreign sovereigns. The Second Circuit, however, did not address any of these alternative grounds for relief. Under these circumstances, not only would denying the petition allow the issue that *was* addressed to percolate in the lower courts, but it also would give lower courts an opportunity to reach these additional defenses. While respondents may of course raise these defenses in this Court as alternative grounds for affirming the judgment, *see Bennett v. Spear*, 520 U.S. 154, 166 (1997), the Court has long expressed a preference for reviewing decisions that *have* considered the federal questions presented, *see Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999). Review of the issue thus is not only premature but is not well presented either.

CONCLUSION

The petition should be denied.

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April 2002

APPENDIX

Appendix A

Current International, Bilateral and Domestic Mechanisms Available to Combat US-Canadian Cross-border Smuggling and Money Laundering

TREATIES ADDRESSING SMUGGLING AND OTHER CROSS-BORDER CRIMINAL CONDUCT

- **Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital**, Sept. 26, 1980, T.I.A.S. No. 11087; Protocol Amending Tax Convention with Canada, Nov. 9, 1995, U.S.-Can., 1 Tax Treaties (CCH) ¶ 1901. 261, at 21,005-26. The Treaty specifically addresses tax collection assistance and provides that the parties to the treaty will assist each other in collecting certain revenue claims that have been "finally determined" by proceedings in the taxing sovereign's own courts. Art. XXVI A(2). Unlike the other provisions of the treaty, this provision applies to all types of taxes collected by each party. The assistance is limited in several ways. Among other things, the Treaty (1) applies only to claims against the requesting country's citizens; (2) is limited to revenue claims that have been "finally determined" after exhaustion of all administrative and judicial rights; and (3) is limited to claims that are "accepted for collection" by the Secretary of the Treasury, who is empowered to reject claims for any reason.

- **The United Nations Convention Against Transnational Organized Crime** (2000) (the "Palermo Treaty"). The United States and Canada have both signed the Palermo treaty but neither has yet ratified it. The multilateral treaty is intended to combat transnational money laundering and organized crime. It requires each signatory to criminalize participation in transnational organized crime and money laundering and to establish criminal and/or civil remedies. A "serious crime," which is the predicate offense for organized crime, includes any offense punishable by a

maximum deprivation of liberty of at least four years or more. This encompasses a number of crimes, including mail fraud and wire fraud. Finally, the Treaty provides for extradition where appropriate under the signatory country's laws.

CANADIAN LAWS AND INITIATIVES ADDRESSING SMUGGLING AND OTHER CROSS-BORDER CRIMINAL CONDUCT

- **The Canadian Excise Act** makes it a crime to sell or offer for sale tobacco products on which excise taxes have not been paid. The statute provides for remedies including fines and jail time. *See* Excise Act, R.S.C., 1985, sec. 240(1). The criminal conspiracy statute creates equivalent penalties for conspiring to sell or offer to sell such tobacco products, including by smuggling them. *See* Criminal Code, Sec. 465(1)(c).

- **The Anti-Smuggling Initiative**, introduced in 1994, provides resources for the Canadian police and the Ministries of Justice and Revenue to target smuggling and distribution networks at the border, in ports, and across the country. In June of 1999, the Government of Canada injected another $78 million over the next four years to combat smuggling. This initiative has led to 17,000 smuggling-related charges resulting in fines in excess of $113 million, and $118 million in evaded taxes and duties have been identified.

UNITED STATES LAWS ADDRESSING SMUGGLING AND OTHER CROSS-BORDER CRIMINAL CONDUCT

- **Smuggling**: Using a vessel to smuggle goods into a foreign country in violation of that country's laws is criminalized by 18 U.S.C. § 546; 19 U.S.C. § 1701 authorizes the boarding of vessels to investigate smuggling. Depositing goods in a building on the boundary between the U.S. and another country or

transporting goods across such a boundary in violation of law is criminalized by 18 U.S.C. § 547.

- **Other U.S. Criminal Laws Used to Fight Smuggling**: Prosecutors have successfully targeted smuggling schemes by using mail fraud, wire fraud and money laundering laws. Laundering money in furtherance of a criminal scheme is prohibited by 18 U.S.C. § 1956. Committing any scheme to defraud using the United States mail is criminalized by 8 U.S.C. § 1341. Committing any scheme to defraud using the interstate wires, including the telephone, is criminalized by 18 U.S.C. § 1343.

BILATERAL INITIATIVES COMBATING SMUGGLING AND OTHER CROSS-BORDER CRIMINAL ISSUES

- **The Canada-U.S. Cross-Border Crime Forum** is a bilateral consultative mechanism to address cross-border crime issues, particularly smuggling. Established in April, 1997 by the President of the United States and the Prime Minister of Canada, the Forum brings together over 100 senior law enforcement and justice officials from Canada and the U.S. on transnational crime problems such as smuggling, organized crime, telemarketing fraud, money laundering, missing and abducted children, crime using computers and other emerging cross-border issues. Resulting agreements between Canadian and U.S. law enforcement agencies provide reciprocal direct access to each other's criminal databases. *See* Office of the Solicitor General of Canada, The Canada-U.S. Cross-Border Crime Forum(Sept.2001) *at* http://www.sgc.ca/WhoWeAre/Policing/CrossBorder/ecrossborder/ecrsbrdr_bkgrd200109.htm.

- **Integrated Border Enforcement Teams** ("IBET") are multi-agency law enforcement teams of United States and Canadian police, immigration and customs officials working together with local, state and provincial

enforcement agencies. The West Coast IBET, established in 1997, averages seizures of about $1 million a month. These seizures include illicit drugs, weapons, tobacco and alcohol, and vehicles. An East Coast IBET was created in June 2000. *See* Press Release, Office of the Solicitor General of Canada, U.S. Attorney General and Solicitor General of Canada Announce New Measures to Tighten Border Security (June 9, 2000) *at* http://www.sgc.gc.ca/Releases/Backgrounders/e20020228.PDF

- The Government of Canada and the Mohawk Council of Akwesasne have instituted new measures to fight cross-border crime, including the investment of an additional $4.6 million to enhance the capacity of the Akwesasne Mohawk Police (AMP) to combat criminal activities in and around the region, which straddles the U.S-Canadian border. The funding will mean more AMP officers for the Mohawk Territory of Akwesasne, which allows for increased participation by the AMP in joint-force border operations. *See* Press Release, Office of the Solicitor General of Canada, Canada-Akwesasne Get Tough on Cross-Border Crime (Feb. 28, 2002) *at* http://www.sgc.gc.ca/Releases/e20020228.htm.

(3)

No. 01-1317

Supreme Court, U.S.
FILED
APR 19 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE ATTORNEY GENERAL OF CANADA,
Petitioner,

v.

RJ REYNOLDS TOBACCO HOLDINGS, INC.; RJ REYNOLDS TOBACCO COMPANY; RJ REYNOLDS TOBACCO INTERNATIONAL, INC.; RJR-MACDONALD, INC.; RJ REYNOLDS TOBACCO COMPANY, PR; NORTHERN BRANDS INTERNATIONAL, INC.; AND CANADIAN TOBACCO MANUFACTURERS COUNCIL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

The question whether foreign nations may sue smugglers operating in the United States for violations of U.S. law is important, wrongly decided below, and squarely presented. The issue is *not* whether RICO "overrode" the revenue rule and opened U.S. courts to foreign tax claims: no one is asserting any such thing. It is whether RICO will be applied as written against fraud committed in the United States—or be subjected to the unwritten exception created in this case. If respondents were right, foreign nations would have no U.S. remedy for serious U.S. misconduct, and Congress would have no "private attorney general" to combat such U.S. smugglers.

1. Canada Has a U.S. Fraud Claim, Not a Canadian Tax Claim. Respondents committed extensive fraud in the United States: *among other things, they formed a U.S. corporation to operate a smuggling scheme from Winston-Salem, manufactured billions of "Canadian" cigarettes in Puerto*

Rico, and transported these and other "Canadian" cigarettes to upstate New York for smuggling into Canada—and one of the respondents and one of its officers pled guilty to U.S. crimes. See Canada's Petition ("Pet.") 3-4. Their violations of U.S. laws deprived Canada, a "person," of "property," including tax revenues. Canada's suit squarely fits the language and serves the central purpose of civil RICO: to make America a more lawful place by punishing and deterring criminal conduct in this country.

Canada is not asking a U.S. court to enforce its tax laws, directly or indirectly. Canada's tax laws impose import taxes and duties only on persons who bring taxable items across its borders. *See* Customs Act R.S.C. 1985, c.1 (2d Supp.), as amended §§ 17, 32. In this case, those persons were street-level smugglers aided and abetted by the 21 individuals who pled guilty to a U.S. indictment. *See* Pet. App. A5-A6.

Canada may have a "tort" claim against respondents under Canadian law, but it is for acts of racketeering committed primarily by U.S. persons, primarily in the United States, in violation of U.S. statutes. Respondents' assertion that Canada could take other steps to recover for U.S. fraud is entirely misplaced: enforcement of U.S. laws against U.S. misconduct does not and should not depend on the legal remedies available in other countries. A U.S. court was the *right* place for Canada to bring these claims.

2. The Revenue Rule Has No Application Here, as a Matter of Case Law, or Policy, or Treaty. The revenue rule bars foreign nations from bringing claims arising under their own tax laws in U.S. courts. *See* Pet. 9-11. Although the rule has been much criticized, *see* Pet. 10 n.5, Canada is *not* arguing either that it should now be abandoned or that RICO somehow "overrode" it. The rule has never (until now) been applied to bar civil claims arising under the law of the *forum* nation, and neither cases nor policy considerations suggest that it should be so expanded.

Cases applying the rule. Respondents' cases *applying* the revenue rule all involved attempted enforcement of foreign tax law or foreign tax judgments, not claims arising under the law of the forum. *See Her Majesty the Queen in Right of British Columbia v. Gilbertson*, 597 F.2d 1161, 1163-66 (9th Cir. 1979) (attempted enforcement of British Columbia tax judgment in U.S. court); *Stringam v. Dubois*, [1993] 3 W.W.R. 273, 283 (attempted enforcement of U.S. tax claim in Canadian court); *Government of India v. Taylor*, [1955] A.C. 491, 492-93, 503-05 (attempted enforcement of Indian tax claim in British court); *Peter Buchanan Ltd. v. McVey*, [1955] A.C. 516, 524-26 (attempted enforcement of Scottish tax claim in Irish court), 532-33; *QRS 1 ApS v. Frandsen*, [1999] 1 W.L.R. 2169, 2176-77 (attempted enforcement of Danish tax claim in British court).

Cases declining to apply the rule. By contrast, courts have invariably declined to apply the revenue rule to civil claims arising under, or legal issues turning on, the law of the forum, even where foreign tax or other revenues were involved. *See Re State of Norway's Application (Nos. 1 and 2)*, [1990] 1 A.C. 723, 809 (House of Lords) (revenue rule inapplicable to taking of evidence under forum law even though evidence was being gathered to prosecute a tax claim in Norway); *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, [1986] 1 A.C. 368, 428, 430, 437, 440-41 (House of Lords) (revenue rule inapplicable to claims based on forum's contract law and trust law); *Re Sefel Geophysical Ltd.*, [1988] 54 D.L.R. (4th) 117, 126-28 (Alta. Q.B.) (Alberta Court of Appeal) (revenue rule inapplicable to claims based on forum's bankruptcy law); *Re Reid*, [1970] 17 D.L.R. (3d) 199, 202-06 (British Columbia Court of Appeal) (revenue rule inapplicable to claims based on forum's law governing administration of estates).

"Indirect" enforcement. Respondents argue (Brief in Opposition ("RBr.") 14) that the rule bars "indirect" as well as direct enforcement of foreign tax laws. But Canada is not

seeking indirect enforcement here. Canada is seeking damages for fraud, in full accordance with a U.S. statute, and its revenue laws come into play only as one measure of what it has lost. None of respondents' three cases remotely suggests that U.S. courts should not enforce U.S. statutes against fraud, merely because the property taken is defined by foreign law:

— In *Banco do Brasil, S.A. v. A.C. Israel Commodity Co.*, 190 N.E.2d 235 (N.Y. 1963) (RBr. 14), plaintiff sued in New York for violation of *Brazilian* currency regulations, claiming that these violations gave it a cause of action under the "Bretton Woods Agreement." The court ruled that the Agreement "imposes no obligation . . . on individuals [i.e., private persons]" such as the *Banco* defendant, 190 N.E.2d at 237, a ruling that has no bearing on this case. Canada has precisely what the *Banco* plaintiff lacked: a U.S. cause of action that Congress deliberately gave to "any person."

— In *Moore v. Mitchell*, 30 F.2d 600 (2d Cir. 1929), *aff'd on other grounds,* 281 U.S. 18 (1930) (RBr. 14), the treasurer of an Indiana county brought suit "to recover [Indiana] taxes alleged to be due and unpaid." 30 F.2d at 601. The court applied straightforward revenue rule analysis to bar the treasurer from maintaining a claim arising under Indiana tax law in a federal court in New York. L. Hand, J., concurring, noted correctly that the revenue rule analysis itself was a matter of the law of the forum, New York. *Id.* at 603. There was no dispute that the claim on the merits arose under Indiana tax law—and no suggestion that an agency of Indiana could not have maintained an otherwise valid claim under New York law in a New York court.

— In *United States v. Harden*, [1963] S.C.R. 366 (Sup. Ct. Can.) (RBr. 14-16), the United States sought to collect in a Canadian court on a stipulated tax judgment entered by a U.S. district court on a U.S. tax claim. The United States said it had a "contract" claim because Harden had stipulated to the U.S. tax judgment, but it was transparently attempting

simply to collect on that judgment. The Supreme Court of Canada's rejection of the claim rested on the black-letter formulation of the revenue rule: one country (Canada) will not "enforce judgments for the collection of taxes . . . rendered by the courts of other states [the U.S.]." *Restatement (Third) of the Law of Foreign Relations* § 483 (1987).

"Indirect" enforcement, as that term is used in discussions of the revenue rule, has always referred to uses of forum courts as mere vehicles for claims whose legal force comes only from foreign tax law, such as in cases seeking enforcement of foreign tax judgments.[1] To repeat, *no* prior authority suggests that the revenue rule bars claims in U.S. courts under U.S. law merely because part of the property the defendants took was foreign taxes.

Policy Issues. All of the "policy" arguments in favor of the revenue rule have no bearing on claims arising under a U.S. statute:

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[1] The House of Lords made this clear in *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, [1986] 1 A.C. 368, 440-41, distinguishing the earlier decisions (cited at RBr. 15) in *Peter Buchanan Ltd. v. McVey*, [1954] I.R. 89 (Ir. H. Ct. 1950), *aff'd*, [1954] I.R. 89, 115 (Ir. S. Ct. 1951). The Lords explained that the revenue rule bars "indirect enforcement" only in a narrow sense, where there is an outstanding foreign tax claim against the same defendants in the foreign jurisdiction, to which the proceeds of the challenged civil action will be applied. The Lords refused to apply the revenue rule where a claim under the law of the forum merely overlapped with a foreign law remedy: "If the [defendants] are correct and the . . . action . . . attempts indirectly to enforce [foreign] law to which the [forum's] courts will not lend their aid, then the practical effect of the [foreign] law is to release from liability . . . every tortfeasor guilty of inflicting a [forum law] civil wrong. . . . A submission which produces such anarchic results and which releases all wrongdoers from [forum law] liability must be fallacious." *Williams & Humbert*, 1 A.C. at 429. *QRS 1 ApS v. Frandsen*, [1999] 1. W.L.R. 2169, 2177 (British Court of Appeals) (cited at RBr. 15) has a similarly narrow understanding of "indirect enforcement."

— *Unwanted Claims.* There is no risk (*see* RBr. 15-16) of opening U.S. courts to claims under foreign law that the United States may not wish to entertain. Canada is asking the U.S. courts only to enforce a U.S. statute, RICO, as Congress wrote it.

— *Foreign Policy and Separation of Powers.* For similar reasons, the "foreign policy" and "separation of powers" concerns that animated the revenue rule (*see* RBr. 1; Pet. App. A10) have no application. Congress and the President performed their pertinent constitutional roles by enacting the federal statutes under which Canada's claim arises. They have no further general role: in U.S. jurisprudence, foreign nations do not need Executive Branch permission to bring valid claims under U.S. statutes, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-09 (1964), and entertaining Canada's U.S. statutory claim would not in any way invade the powers of the political branches. On the contrary, in this case, Reynolds has asked the courts to invade Congress's prerogatives by creating an unwritten (and wholly unevidenced) exception to the statute Congress wrote. The foreign policy embarrassment in this case is denying a foreign nation a claim under U.S. law that Congress clearly gave it.

— *The U.S.-Canada Tax Treaty.* The Treaty also has no proper bearing on the issues in this case. *Cf. United States v. Alvarez-Machain,* 504 U.S. 655, 666-68 (1992). The Treaty specifies the instances in which each country will assist the other in enforcing its own tax laws against persons liable for its taxes. It says nothing about the rights of either country to bring claims arising under the laws of the other country. Convention Between the United States of America and Canada With Respect to Taxes on Income and Capital, Sept. 26, 1980, U.S.-Can., T.I.A.S. No. 11087; Protocol Amending the Convention Between the United States of America and Canada With Respect to Taxes on Income and Capital, Nov. 9,

1995, U.S.-Can., Art. XXV1 A(2), 1 Tax Treaties (CCH) ¶ 1901.261, at 21,005-26.

— *Litigation Practicalities.* There is also no practical reason to dismiss Canada's claim at this stage. Canada will, to be sure, have to prove aspects of its tax laws to show that Reynolds' actions injured Canada "in its . . . property." But respondents do not assert that there will be any material dispute, and federal courts are ordinarily fully capable of determining matters of foreign law that arise in the course of applying a U.S. federal statute.

— *Promoting U.S. Trade.* Finally, Reynolds should blush to argue (RBr. 5) that this Court should assist "U.S. traders" by affirming a newly invented bar against the enforcement of longstanding U.S. statutes outlawing fraudulent activities. Smuggling-related activities carried out in the United States by U.S. persons hurt everyone: "[A] general spirit of smuggling . . . is always prejudicial to the fair trader, and eventually to the revenue itself . . . ." The Federalist No. 35, at 231 (A. Hamilton) (Kramnick ed. 1987).

3. The Second Circuit's Misinterpretation Is Important. The importance of this case goes far beyond the dollars at issue here and in *The European Community v. Japan Tobacco, Inc.*, 186 F. Supp. 2d 231 (E.D.N.Y. 2002). The question is whether the victims of a criminal smuggling enterprise will have any remedy at all in the country whose laws were violated, where the perpetrators reside and where they principally conducted their smuggling scheme.

Congress authorized civil RICO claims not only to compensate victims of criminal enterprises but to punish and deter crime that is harmful to U.S. society. Like other criminal activity, smuggling activities here do not merely steal from their direct victims—foreign countries; they distort lawful competition and engender an atmosphere of lawlessness that corrupts U.S. individuals and corporations. Congress determined to punish fraudulent activities—including the actions alleged in this case—severely, and it was entirely inappropri-

ate for a federal court to create an exception where the victim is a foreign country.

Respondents assert (RBr. 11) that the decision below will not "require[] countries to abandon efforts to stop cross-border tax evasion and smuggling," but it will most certainly cripple those efforts. The decision would deny victim countries any remedy in the courts of the countries where smugglers operate in violation of local law. Congress explicitly recognized the importance of a civil remedy—including treble damages—to punish and deter the kinds of conduct Reynolds engaged in here, and "efforts to stop cross-border tax evasion and smuggling" obviously must, to be effective, include efforts in the countries where the evaders and smugglers operate.

4. The Court Should Grant the Writ Despite the Absence of a Circuit Conflict. Although there is no conflict between circuits in this case, the issues have been extensively explored both in the majority and dissenting opinions below and in the lengthy first opinion of Judge Garaufis in the *European Community* case. *The European Community v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 483-86 (E.D.N.Y. 2001) (holding, prior to the Second Circuit's decision in this case, that the revenue rule does *not* bar civil RICO claims by foreign sovereigns relating to cigarette smuggling activities in the United States).

Two of the five federal judges that have considered the application of the revenue rule to claims of foreign nations under RICO—Judges Calabresi and Garaufis—have squarely disagreed with the conclusion of the panel majority, suggesting that there is hardly a "universality of opinion" (*see* RBr. 5) on this issue. This disagreement, the extensive exploration, the importance of the question whether foreign nations may pursue U.S. smugglers in this country for violating U.S. law, and the risk that foreign courts will cite and follow the Second Circuit's decision, all combine to make this a case that is both ripe and appropriate for this Court's considera-

tion. There is no reason to force foreign nations to test additional U.S. judicial waters.

5. The Question Is Squarely Presented. The Second Circuit affirmed the dismissal of Canada's complaint on the sole ground that the revenue rule bars Canada's claim. That court's ruling could hardly have been more categorical: the rule, it said, bars foreign nations from bringing claims under U.S. law where their losses include tax revenues, and bars all of Canada's claims, including claims for enforcement expenses, equitable relief, and disgorgement of Reynolds' ill-gotten gains. Pet. App. A10. There is no other issue to becloud the Court's consideration of that ruling.

Reynolds counters lamely (RBr. 17-18) that if the Court were to reverse the Second Circuit Reynolds would have *other* defenses (several of which were rejected by the district court, Pet. App. B18-B30), but that is hardly a reason for not considering the legal question squarely presented by the dismissal. The Court need not be concerned by the threat (*see* RBr. 18) that respondents will devote pages of their merits brief to issues other than the ruling below.

CONCLUSION

For the reasons set forth above and in Canada's Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APRIL 2002

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OCT 8 2002

No. 01-1317

In the Supreme Court of the United States

ATTORNEY GENERAL OF CANADA, PETITIONER

v.

R.J. REYNOLDS TOBACCO HOLDINGS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the "revenue rule" precludes a foreign sovereign from bringing a civil RICO claim where the foreign sovereign's alleged injury is lost tax revenue and associated law enforcement costs.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

The Attorney General of Canada (petitioner) filed suit on behalf of the Government of Canada in the United States District Court for the Northern District of New York, alleging that RJ Reynolds Tobacco Holdings, Inc., RJ Reynolds Tobacco Company, RJ Reynolds Tobacco International Inc., RJR-McDonald, Inc., RJ Reynolds Tobacco Company, PR, Northern Brands International, Inc., and the Canadian Tobacco Manu-

facturers Council (respondents) engaged in a scheme to smuggle cigarettes across the United States-Canadian border in order to avoid the payment of Canadian taxes, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* Pet. App. A3. The district court dismissed petitioner's complaint. *Id.* at B1-B40. In reliance on the principle that a United States court will not enforce a foreign country's tax claims (the revenue rule), the court of appeals affirmed. *Id.* at A1-A56.

1. Petitioner's complaint makes the following allegations, which, on a motion to dismiss, must be accepted as true. In 1991, Canada doubled the taxes it imposed on tobacco products. Pet. App. A4. Respondents thereafter allegedly devised and implemented a scheme to avoid payment of the tax. *Ibid.* Respondents allegedly exported cigarettes from Canada and delivered them to distributers in Foreign Trade Zones in New York. *Id.* at A4-A5. The distributors then shipped the cigarettes to the St. Regis/Akwesasne Indian Reservation, which straddles the New York-Canadian border. *Ibid.* From there, distributors smuggled the cigarettes back into Canada for sale on the Canadian black market. *Ibid.*

In 1992, Canada imposed an export tax on cigarettes. In order to avoid that tax, respondents allegedly shipped raw tobacco from Canada to Puerto Rico where they manufactured cigarettes made to look like they had been manufactured in Canada. The cigarettes were then allegedly delivered to Foreign Trade Zones in New York, brought to the Reservation, and smuggled into Canada. Respondents also allegedly employed a company to process Canadian tobacco in North Carolina. The tobacco was then smuggled into Canada for sale on the black market. Pet. App. A5.

In conducting their scheme, respondents allegedly used United States mails and wires to make payments and to place and receive orders. Pet. App. A5-A6. Respondents allegedly made several million dollars in profits as a result of their scheme. *Id.* at A5.

Petitioner filed suit in federal district court, alleging that respondents had engaged in a pattern of racketeering in violation of RICO. Pet. App. A6. In particular, petitioner alleged that respondents' smuggling scheme involved repeated instances of mail fraud and wire fraud. *Ibid.* In order to recover under RICO, a civil plaintiff must establish that a RICO violation has caused injury to the plaintiff's "business or property." 18 U.S.C. 1964(c). In an attempt to satisfy that requirement, petitioner alleged that respondents' pattern of racketeering had caused injury to Canada's "property" in the form of lost tax revenue and increased law enforcement costs. Pet. App. A6-A7. As relief, petitioner sought treble damages for Canada's lost tax revenue and law enforcement costs, and various forms of equitable relief. *Id.* at A7.

The district court dismissed petitioner's claim under RICO for lost tax revenue based on the "revenue rule," Pet. App. B8-B17, under which courts of one sovereign will not enforce the tax judgments or unadjudicated tax claims of another sovereign. The district court dismissed petitioner's claim for increased law enforcement costs on the ground that such costs do not constitute an injury to "business or property" within the meaning of RICO. *Id.* at B31-B39. Finally, the district court dismissed petitioner's claims for equitable relief on the ground that RICO authorizes only the United States to seek equitable relief. *Id.* at B39-B40.

2. The court of appeals affirmed, Pet. App. A1-A67, holding that "the revenue rule bars [petitioner's] action

in its entirety," *id.* at A10. The court explained that the "revenue rule is a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns," and is justified by "respect for sovereignty, concern for judicial role and competence, and separation of powers." *Ibid.* In particular, "[w]hen a foreign nation appears as a plaintiff in our courts seeking enforcement of its revenue laws, the judiciary risks being drawn into issues and disputes of foreign relations policy that are assigned to—and better handled by—the political branches of government." *Id.* at A18-A19.

The court of appeals also noted that the United States has entered into treaties with foreign governments that have carefully limited the circumstances under which foreign governments may invoke the assistance of United States courts to enforce foreign tax liability. Pet. App. A27-A28. Against that background, the court of appeals explained, "courts must be wary of intruding in a way that undermines carefully conceived and negotiated policy choices." *Id.* at A28. The court of appeals found it particularly significant that a treaty between the United States and Canada bars assistance for claims against citizens of the host country, permits each party to determine whether a particular tax liability should be enforced, and requires the party requesting assistance to certify that the revenue claim has been finally determined. *Id.* at A29-A30. Because the Treaty "specifically exclude[s] the type of assistance Canada seeks in this case," the court concluded, permitting petitioner's claim to go forward would "ignor[e] and undermin[e] the treaty negotiation process and the clearly expressed views of the political branches of the United States." *Id.* at A34.

The court of appeals rejected petitioner's contention that the revenue rule is inapplicable because petitioner filed suit under RICO, and not under Canadian tax law. Pet. App. A40-A47. The court noted that under established principles of statutory construction, federal statutes are interpreted to preserve well-established common law rules except when a statutory purpose to the contrary is evident. *Id.* at A43. Applying that principle, the court found "no language in RICO or in its legislative history that demonstrates any intent by Congress to abrogate the revenue rule." *Id.* at A46. The court also rejected petitioner's characterization of its claim as one arising "solely" under United States law, concluding that "[o]n the contrary, Canada seeks to use the United States law to enforce, both directly and indirectly, its tax laws." *Id.* at A49. The court reasoned that because petitioner seeks through its RICO claim to "have a United States court require [respondents] to reimburse Canada for its unpaid taxes, plus a significant penalty due to RICO's treble damages provision, * * * Canada's object is clearly to recover allegedly unpaid taxes." *Id.* at A50. The court viewed petitioner's claim for law enforcement costs as "an indirect attempt to have a United States court enforce Canadian revenue laws," *ibid.*, because "[t]he primary purpose identified by Canada for using its police forces to stop smuggling was to enforce its customs and excise taxes." *Id.* at A51.

The court of appeals distinguished prior circuit precedent holding that the revenue rule does not apply to criminal prosecutions by the United States of schemes to defraud a foreign nation of taxes. Pet. App. A34-A37. The court explained that because such criminal prosecutions are brought to serve the interest of the United States, and are subject to Executive

Branch oversight, "the foreign relations interests of the United States may be accommodated throughout the litigation." *Id.* at A35. "In contrast," the court observed, "a civil RICO case brought to recover tax revenues by a foreign sovereign to further its own interests, may be, but is not necessarily, consistent with the policies and interests of the United States." *Id.* at A35-A36.

Judge Calabresi dissented from the panel's ruling. Pet. App. A56-A57. In his view, the revenue rule has no application to petitioner's suit, because "Canadian tax laws come into play only indirectly, as a factor to be used in the calculation of damages, and do so entirely because the RICO statute itself makes the Canadian laws relevant to that calculation." *Id.* at A57.

DISCUSSION

This RICO action by the Attorney General of Canada to recover damages for illegal tobacco smuggling raises issues that are of importance to both Canada and the United States. The United States has a strong interest in combatting such cross-border illegal activity, as is demonstrated by the government's use of federal criminal law to prosecute schemes involving facts similar to those alleged here. Canada has a strong interest in recovering damages for financial injuries caused to it by fraud. And both countries have a mutual interest in collaborative efforts to prevent and deter such international smuggling schemes. Nevertheless, on the question presented in this case, the Second Circuit correctly held that the revenue rule precludes a foreign government from bringing a civil RICO claim where its alleged injury is lost tax revenue.

The revenue rule serves important separation-of-powers interests that transcend the particular context

of the present action by Canada. The rule avoids involving the judiciary in making judgments about foreign tax policies and procedures and interwoven foreign policy considerations, and it leaves the Executive Branch and the Senate free to decide through the treaty-making process the extent to which exceptions to that principle should be recognized. The rule also leaves the Executive Branch free to use federal criminal law to protect against frauds based in the United States that seek to avoid other countries' tax laws. RICO was drafted against the backdrop of the revenue rule, which has a long pedigree in this country and abroad. There is no evidence that Congress intended to displace the revenue rule in this context and to permit civil damages actions by foreign sovereigns to recover alleged tax losses. Because the court of appeals correctly resolved the question before it, because there is no conflict with a decision of any other court of appeals, and because the application of the revenue rule by the Second Circuit properly respects the different roles of the courts and the political branches in matters involving foreign taxes, the petition for a writ of certiorari should be denied.

1. The revenue rule is a long established and widely accepted principle of the common law under which courts of one sovereign will not enforce the tax judgments and unadjudicated tax claims of another sovereign. Pet. App. A10. The rule can be traced to the eighteenth century when British courts declined to apply foreign revenue laws that would have hindered trade in British goods. See *Boucher* v. *Lawson*, 95 Eng. Rep. 53, 56 (K.B. 1734) (Lord Hardwicke, C.J.). In an early case, Lord Mansfield stated the rule broadly as providing that "no country ever takes notice of the revenue laws of another." *Holman* v. *Johnson*, 98 Eng.

Rep. 1120, 1121 (1775). Since then, numerous domestic and foreign courts have applied the rule to bar claims that, in substance, seek to enforce foreign revenue laws. See, *e.g.*, *QRS 1 Aps* v. *Frandsen*, [1999] 3 All E.R. 289 (C.A. 1999); *Her Majesty the Queen in Right of the Province of British Columbia* v. *Gilbertson*, 597 F.2d 1161 (9th Cir. 1979); *Banco Do Brasil, S.A.* v. *A.C. Israel Commodity Co.*, 239 N.Y.S.2d 872 (1963); *United States* v. *Harden*, [1963] S.C.R. 366 (Sup. Ct. Can.); *Peter Buchanan Ltd.* v. *McVey*, [1955] A.C. 516 (Ir. H. Ct. 1950), aff'd, [1955] A.C. 530 (Ir. S. C. 1951).

This Court has not had occasion to decide the extent to which the revenue rule binds courts of the United States. But it has recognized that courts in this country and elsewhere have applied that rule to preclude one country from seeking to enforce its tax laws in the courts of another. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 413-414 (1964) (recognizing the "principle enunciated in federal and state cases that a court need not give effect to the penal or revenue laws of foreign countries"); *Oklahoma* v. *Gulf, Colorado & Santa Fe Ry.*, 220 U.S. 290, 299 (1911) ("The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.") (emphasis deleted) (quoting *Wisconsin* v. *Pelican Insur. Co.*, 127 U.S. 265, 290 (1888), overruled by *Milwaukee County* v. *M.E. White Co.*, 296 U.S. 268, 278 (1935), to the extent that it held that States are not bound by the Full Faith and Credit Clause to enforce the tax judgments of other States).

The revenue rule is not only a well-established feature of the common law and of international law; it provides the background understanding against which the United States has entered into treaties that address the extent to which a foreign nation may seek assistance from the United States and its courts in enforcing its tax claims. In entering into those treaties, the United States has created carefully limited exceptions to the principle that a foreign country may not enforce its tax claims in United States courts. The recent treaty with Canada is illustrative. That treaty excludes claims against citizens or companies of the host country; it gives the government discretion to decline a particular application for assistance; and it provides only for the enforcement of finally adjudicated claims. Pet. App. A29-A30. No provision in the treaty authorizes either country to proceed directly in the other's courts to collect a tax claim; each government is instead to request assistance from the other government. See, e.g., *United States* v. *Stuart*, 489 U.S. 353 (1989) (enforcing IRS summons issued pursuant to treaty request in aid of Canadian tax investigation). Other treaties have limited the right to assistance still further—to assistance necessary "to [e]nsure that the exemptions or reduced rates of tax provided under the respective conventions will not be enjoyed by persons not entitled to such benefits." S. Exec. Rep. No. 1, 82d Cong., 1st Sess. 21 (1951).

While the revenue rule has been the subject of some judicial and scholarly criticism, it is supported by several related separation-of-powers considerations. First, courts lack the institutional competence to decide when it is in the interest of the United States to permit a foreign country to enforce its tax laws in United States courts. The court of appeals' hypothetical tax laws

(Pet. App. A17) illustrate the difficulties that can arise when a court is forced to make such judgments. For example, a court is not well-positioned to decide whether the interests of the United States are served by enforcing a tax that is designed to discourage the sale of a United States newspaper, or that makes it prohibitively expensive to use United States parts, or that is imposed on members of a particular race, nationality, or religion. More subtle judgments about tax rates or the fairness of an underlying collection regime also would inappropriately involve the courts in foreign relations matters. Nor do courts have the competence to decide which foreign countries should be able to use the courts of this country to collect tax revenue and which should not. Those judgments are more appropriately made by the Executive and Legislative Branches.

Second, when a court enforces a foreign tax claim, it cannot ensure that the United States will enjoy a reciprocal privilege in the foreign country's courts. Indeed, judicial enforcement of foreign tax claims would deprive the Executive Branch of leverage to secure such reciprocity through the negotiation of bilateral treaties.

Finally, judicial enforcement of foreign tax claims that are not authorized by treaty would intrude on the Executive Branch's treaty-making authority as well as the specific policy judgments reflected in particular treaties. Those considerations fully justify the continued application of the revenue rule.

2. The Attorney General of Canada does not challenge the general principle that courts may not enforce the tax claims of a foreign sovereign. He instead argues (Pet. 9-11) that the revenue rule is inapplicable in this case because his claim arises under

RICO, not under Canada's tax laws. The reliance of the complaint on the RICO statute does not render the revenue rule inapplicable.

a. The RICO statute was drafted against the background of the common law principle that courts will not enforce the tax claims of a foreign sovereign. When a common law principle is as well established as the revenue rule, "the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991).

That principle has particular force here because the revenue rule has served as the foundation for United States tax treaties. There is no indication in the text or history of the RICO statute that Congress intended to override the established principle that courts will not enforce a foreign sovereign's tax claims. Nor is there any indication in the text or history of RICO that Congress intended to depart from the judgment of the political branches that exceptions to the revenue rule should be carefully limited and embodied in bilateral treaties. Accordingly, RICO cannot properly be read to authorize a suit that would otherwise be barred by the revenue rule.

b. The revenue rule bars the instant claim. Petitioner contends that Canada's claim arises under RICO, rather than Canadian tax law. But, while petitioner has asserted a claim under RICO, the injury that petitioner asserts and the damages that petitioner seeks to collect depend on Canadian tax law. In particular, petitioner asserts that Canada is injured in its property because respondents caused a loss of tax revenue, and petitioner seeks to collect as damages three times that revenue loss. Petitioner's action is

therefore predicated on both RICO *and* Canadian tax law. Claims of that character have long been understood to fall within the prohibition of the revenue rule.

The revenue rule bars indirect as well as direct efforts to enforce foreign tax claims. *Harden*, [1963] S.C.R. at 371; *Banco Do Brasil, S.A.*, 239 N.Y.S.2d at 875; see also *QRS 1 Aps*, 3 All E.R. at 291, 293; *Peter Buchanan Ltd., supra*, [1955] A.C. at 529. A foreign sovereign's claim that relies on a domestic law of general application, but that seeks to recover tax loss as damages, necessarily reflects an effort to enforce a tax claim indirectly.

Decisions applying the revenue rule support that conclusion. For example, in *Harden*, the United States brought suit in Canada to recover for breach of a contract that settled a tax liability dispute. Although the suit was founded on private contract law, the Canadian Supreme Court held that the "the special principle that foreign States cannot directly or indirectly enforce their tax claims [in our courts]" barred the claim. [1963] S.C.R. at 371. The court reasoned that when "the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction." *Id.* at 372-373. Similarly, in *Banco Do Brasil, S.A.*, the government of Brazil, through its central bank, brought suit in New York state court, alleging that a New York importer had committed fraud by conspiring with a Brazilian exporter to evade currency controls. 239 N.Y.S.2d at 873. The New York Court of Appeals held that the revenue rule precluded Brazil's suit. The court explained that Brazil "is seeking, by use of an action for conspiracy to defraud, to enforce what is clearly a revenue law." *Id.* at 875.

Those decisions reflect a sound application of the revenue rule. If foreign sovereigns could avoid the revenue rule by recharacterizing a foreign tax claim as a cause of action based on domestic law, such as common law fraud, or unjust enrichment, or breach of contract, or injury from a pattern of racketeering, the revenue rule would lose much of its force. Many, if not most, schemes to avoid the payment of taxes can be recharacterized in such terms.

c. Equally important, a foreign sovereign's claim that relies on a domestic law of general application, but that asserts tax loss as the basis for recovery, implicates the separation-of-powers concerns that underlie the revenue rule. Courts lack the institutional competence to determine whether enforcement of such claims would serve the interests of the United States; courts can provide no guarantee that the United States may enforce a similar claim in the courts of the foreign sovereign; and judicial enforcement of such a claim would intrude on the Executive Branch's treaty making authority and the policy judgments reflected in specific United States treaties.

The latter two considerations are strongly implicated in this case. The Canada Supreme Court's decision in *Harden* suggests that the United States would not be able to enforce a comparable claim in Canadian courts. And allowing Canada's suit to go forward would undermine specific policy judgments reflected in the United States' treaty with Canada, including the judgment that only finally adjudicated tax claims may be enforced in United States courts.

Petitioner argues (Reply Br. 6) that separation-of-powers concerns are inapplicable here because Congress has made the relevant policy judgment by authorizing any person to sue to recover damages for

an injury to property that is caused by a pattern of racketeering. But there is no evidence that when Congress enacted that general language, it intended to permit the enforcement of *any* tax claim by *any* foreign government, as long as the claim could be recharacterized as a violation of RICO. Nor is there evidence that Congress intended to permit the enforcement of such a claim without regard to whether the foreign country would permit the United States to enforce a comparable claim in its courts. And there is no indication that Congress intended to depart from the previous judgment of the political branches that exceptions to the revenue rule should be carefully limited and embodied in bilateral treaties. Indeed, if Canada's RICO suit were deemed permissible here, the doors to United States courts would also apparently be open to RICO treble damages actions by countries far less friendly to the United States, based on tax systems of questionable compatibility with our own, and perhaps against a background in which the political branches had rejected or been unable to secure any reciprocal treaty obligations to assist in tax collection efforts. The court of appeals therefore correctly concluded that a claim such as petitioner's RICO claim for tax loss is barred by the revenue rule.[1]

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[1] In addition to seeking damages based on tax loss, petitioner also seeks damages for increased law enforcement costs and various forms of equitable relief. Petitioner does not contend that if his claim for tax loss is barred by the revenue rule, his other claims for relief would nonetheless fall outside the revenue rule. As the court of appeals explained (Pet. App. A50-A51), petitioner's increased law enforcement costs are directly associated with petitioner's effort to collect unpaid taxes. And petitioner's claims for equitable relief seek to vindicate the same interest in avoiding tax loss and increased law enforcement costs as do petitioner's

3. The court of appeals in this case is the first and only appellate court to resolve the question whether the revenue rule bars a foreign sovereign's claim under RICO for damages based on tax loss. There is therefore no conflict in the circuits on that question that would warrant this Court's review.[2]

Petitioner contends that review is warranted in this case, even absent such a conflict, because the court of appeals' decision undermines efforts to combat international smuggling (Pet. 12-15) and implicates the rights of a foreign sovereign (Pet. 16-17). Collaboration between the United States and Canada to deter and punish such smuggling is unquestionably an important objective. But the court of appeals expressly reaf-

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claims for damages. In any event, because petitioner does not press any argument that is specific to his claims for law enforcement costs and equitable relief, the question whether those claims can be distinguished, for purposes of the revenue rule, from petitioner's claim for lost revenue, is not presented here.

The district court dismissed petitioner's claims for equitable relief on the ground that only the United States may seek equitable relief under RICO. Pet. App. B39-B40. This Court granted certiorari to resolve that issue in *Operation Rescue* v. *National Organization For Women, Inc.*, No. 01-1119, and *Scheidler* v. *National Organization For Women, Inc*, 122 S. Ct. 1604 (2002) (No. 01-1118). Because the court of appeals upheld dismissal of petitioner's claim for equitable relief on the basis of the revenue rule, and because the petition in this case does not raise the question presented in *Operation Rescue* and *Scheidler*, there is no reason to hold the petition in this case pending the decisions in those cases.

[2] There are at least two other cases pending in the lower courts that raise similar issues. *The European Community* v. *RJR Nabisco, Inc.*, 150 F. Supp. 2d 456 (E.D.N.Y. 2001); *The Republic of Ecuador* v. *Philip Morris Companies*, 188 F. Supp. 2d 1359 (S.D. Fla. 2002). But those cases have not yet produced appellate court decisions.

firmed its holdings in prior cases that the revenue rule does not bar a criminal prosecution by the United States of conduct that is designed to defraud a foreign country of tax revenue. Pet. App. A34-A37 (reaffirming *United States* v. *Trapilo*, 130 F.3d 547, 549 (2d Cir. 1997), cert. denied, 525 U.S. 812 (1998); *United States* v. *Pierce*, 224 F.3d 158 (2d Cir. 2000)). Such prosecutions do not implicate the revenue rule because that rule applies only when the plaintiff is a foreign government or someone acting on its behalf, and the plaintiff is seeking to vindicate a foreign government's interest in collecting taxes. See *Re Reid*, [1970] 17 D.L.R. (3d) 199, 205 (B.C. Ct. App.) (noting that in all the cases where the revenue rule had been invoked "the foreign State was * * * the plaintiff, the claimant or the instigator of the proceedings"); *Peter Buchanan Ltd.*, [1955] A.C. at 527 (critical fact was "that right is being enforced at the instigation of a foreign authority").

The distinction between a criminal prosecution brought by the United States and a civil action for the recovery of tax revenue brought by a foreign sovereign is critical, and it precisely aligns with the policies underlying the revenue rule. As the court of appeals explained, criminal prosecutions vindicate the interests of the United States, and they are subject to Executive Branch control. Pet. App. A35. In contrast, a foreign sovereign brings a civil RICO action to further its own interest in collecting taxes, and that interest is not in all circumstances necessarily consistent with the interests of the United States. *Id.* at A35-A36.[3]

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[3] For the reasons discussed above, the First and Fourth Circuits erred in holding that the revenue rule bars the United States from criminally prosecuting under the wire fraud statute a

Because the United States retains authority to prosecute international smugglers, the court of appeals' decision leaves intact a powerful means to deter and punish such conduct. At the same time, it properly reserves the decision whether to address, in a judicial forum, schemes involving foreign tax laws in the hands of the Executive Branch of our own government. Canada, for its part, has means to vindicate its interest in attacking international smuggling operations by filing suit to enforce its laws in Canadian courts and by requesting cooperation from the United States under mutual assistance treaties. A decision to authorize further judicial steps, such as treble damages actions against United States citizens, should await a clearer statement in a treaty or in legislation. The correct application of the revenue rule in this case does not call for this Court's intervention.

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scheme that is designed to deprive a foreign sovereign of tax revenue. See *United States* v. *Boots*, 80 F.3d 580 (1st Cir.), cert. denied, 519 U.S. 905 (1996); *United States* v. *Pasquantino*, No. 01-4463, 2002 WL 31159094 (4th Cir. Sept. 30, 2002). The conflict in the circuits on that question is not at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

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* The Solicitor General is disqualified in this case.

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(5)

Supreme Court, U.S.
FILED
OCT 11 2002
OFFICE OF THE CLERK

No. 01-1317

IN THE

Supreme Court of the United States

THE ATTORNEY GENERAL OF CANADA,
Petitioner,

v.

RJ REYNOLDS TOBACCO HOLDINGS, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

The Solicitor General acknowledges that this case "raises issues that are of importance to both Canada and the United States." U.S. Br. 6. He does not dispute that this case presents a good vehicle for addressing those issues. He disagrees with Canada on the merits, but he makes no persuasive argument against review.

1. The Solicitor General recognizes that "[t]he United States has a strong interest in combatting . . . cross-border illegal activity," that Canada has "a strong interest in recovering damages for financial injuries caused to it by fraud," and that "both countries have a mutual interest in collaborative efforts to prevent and deter . . . international smuggling schemes" like the one involved in this case. *Id.* But he greatly understates the importance of the question presented, because he focuses on the interests of the Executive Branch

and not on the statute Congress enacted. RICO gives "any person," including foreign governments, the right to sue for damages, precisely because Congress did not want to leave the war against large-scale illegal activities solely to the discretion and resources of public prosecutors. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-500 (1985); *see especially id.* at 490 n.9 (reviewing problems with making civil relief dependent on criminal actions). The Solicitor General ignores the United States' fundamental interest in ensuring that RICO is enforced as Congress wrote it.

2. The Solicitor General also recognizes (U.S. Br. 10-11) that Canada's quarrel in this case is not with the revenue rule, but with the Second Circuit's unprecedented expansion of the traditional rule to create an unwritten exception to RICO and other U.S. laws. Canada is not seeking to enforce its tax laws in the United States, but to enforce its rights under U.S. substantive law. The question is not whether RICO "authorize[s] a suit that would otherwise be barred by the revenue rule" (*id.* at 11), but rather why the revenue rule should somehow bar a claim that RICO expressly provides, addressing misconduct committed in the United States, by U.S. persons, in violation of U.S. law.

a. The cornerstone of the Solicitor General's position is that Canada is asserting a Canadian tax claim, and that the revenue rule bars even "indirect" claims for foreign taxes. *Id.* at 11-13. But it is simply incorrect to characterize Canada's U.S. RICO claim as a Canadian tax claim, direct or indirect. Respondents are not even the Canadian taxpayers; they committed mail and wire fraud in the United States, for which Canada is pursuing them under U.S. law. It is not a *defense* to that action that respondents' misconduct enabled *other* persons to evade Canadian taxes. Canada Reply Br. 1-

2.[1] All of the "indirect" enforcement cases cited by the Solicitor General (U.S. Br. 12) were cases where the force of the claims came from foreign revenue laws, and the forum court was a mere vehicle into which the foreign nation sought to project its sovereignty. Canada Reply Br. 4-5 (discussing cases). No revenue rule case before this one has ever restricted the forum state from applying its own law.

The Solicitor General's only response on this point is the assertion that "[m]any, if not most, schemes to avoid the payment of [foreign] taxes [could] be recharacterized" as violations of U.S. law. U.S. Br. 13. But that is wrong. It is not hard to determine whether a foreign nation is making a bona fide claim of violation of U.S. law, in the United States, by U.S. actors—as Canada clearly is in this case.

b. The Solicitor General suggests (*id.* at 13-14) that the court of appeals' refusal to enforce RICO shows a proper concern for the separation of powers. But with all due respect, it is the Solicitor General who would invade another Branch's constitutional powers. Congress enacted a statute giving "any person" the right to sue for U.S. frauds of the kind committed here. Indeed, the Solicitor General frankly concedes that the "general language" of RICO would permit Canada's claim. *Id.* There is no justification for allowing the Executive Branch and the courts to carve discretionary exceptions out of the statute as written.

The Solicitor General argues that there is "no evidence" that Congress intended RICO to cover Canada's claim; or that Congress intended to permit enforcement of RICO in the

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[1] The fraud defendants in this case are not the persons on whom Canadian law imposes the taxes and duties that were evaded. *Id.* at 2. The Solicitor General's suggestion that Canada could proceed against them in its own courts (U.S. Br. 17) ignores that fact. More fundamentally, RICO was designed to supplement other remedies for lawbreaking in the United States, and that is what occurred here. *See, e.g., Sedima*, 473 U.S. at 498; *United States v. Turkette*, 452 U.S. 576, 586-587 (1981).

absence of some sort of "reciprocity"; or that Congress intended to interfere with the Executive Branch's prerogative to decide tax enforcement policy through treaties. *Id.* But the Solicitor General has it backwards: RICO's plain language concededly embraces Canada's cause of action. This Court does not ordinarily demand special evidence that Congress meant what it said.[2]

There is, moreover, no requirement of "reciprocity." Canada's right to sue under RICO does not depend on whether Canada has enacted a RICO-like statute under which the United States could sue in a Canadian court for a Canada-based fraud. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-412 (1964). There is also no reason to believe that Canada would not allow the United States to enforce any comparable right it might have under Canadian law.[3] While it is true that U.S. "courts can provide no guarantee that the United States may enforce a similar claim in the courts of a foreign sovereign" (U.S. Br. 13), that point is irrelevant where Congress has created a U.S. cause of action in favor of "[a]ny person."

Neither any Canada-U.S. Treaty nor the treaty-making prerogative of the Executive Branch suggests any reason for

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[2] The Solicitor General's assertion that Congress enacted RICO "against the backdrop" of the revenue rule begs the question. At the time, the revenue rule had never been interpreted to preclude U.S. courts from hearing any action arising under U.S. law, and Congress could not have thought that the rule as traditionally applied would bar a RICO claim. *See United States v. Pasquantino*, No. 01-4463, 2002 WL 31159094, at *7 (4th Cir. Sept. 30, 2002) (Hamilton, J., dissenting).

[3] *United States v. Harden*, [1963] S.C.R. 366 (Can.), on which the Solicitor General relies (U.S. Br. 13), was a case in which the United States sought to collect in Canada on a *tax judgment* entered by a U.S. court, and is inapposite here. *See* Canada Reply Br. 4-5. *Harden* is a classic revenue rule case, and neither holds nor "suggests" (U.S. Br. 13) that a foreign government could not proceed in a Canadian court on a cause of action created by Canadian law and "comparable" (*id.*) to RICO.

untethered Executive Branch discretion to carve out exceptions to RICO. Treaties set forth the occasions on which Country A will assist Country B in enforcing B's laws; they do not speak to B's rights under A's substantive law. *See* Canada Reply Br. 6.[4] The implication that treaties somehow bar U.S. courts from applying U.S. law against U.S. citizens is obviously wrong. The Solicitor General correctly points out that the Second Circuit's decision effectively "reserves the decision" whether to enforce RICO in a case like Canada's entirely to the Executive. U.S. Br. 17. But there is nothing "proper[]" (*id.*) about that decision where Congress has established a contrary enforcement regime in the statute itself.

3. Finally, the Solicitor General argues that there is no need for immediate review because—he says—the decision below bars only civil claims, and leaves intact the ability of the Executive Branch to bring criminal RICO prosecutions. *Id.* at 7, 15-17. But there is no obvious basis in the revenue

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[4] The Solicitor General expresses concern that "less friendly" countries may sue next. U.S. Br. 14. But if those countries can prove an actionable claim under a U.S. statute, it is well established that they may sue in the United States. *See Sabbatino*, 376 U.S. at 410 ("This Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence, and, lacking some definite touchstone for determination, we are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts."). If in some particular case the claim were repugnant to U.S. public policy, legal doctrine independent of the revenue rule would allow a U.S. court to stay its hand. *Cf., e.g.*, Restatement (Third) of Foreign Relations Law § 482(2) (1987) (U.S. court need not enforce foreign judgment if repugnant to U.S. public policy); *Ackermann v. Levine*, 788 F.2d 830, 843-844 (2d Cir. 1986) (applying German law); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 110-111 (1918) (state court may refuse to enforce law of another state, but only if it "violate[s] some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal"). But such a case should be the rare exception. There is no basis for rejecting all claims of all foreign countries, as the Second Circuit did.

rule—and certainly none in RICO—for treating civil and criminal cases differently, and two other federal circuits (the First and the Fourth) have now expressly declined to do so, applying the revenue rule to bar federal criminal prosecutions of smuggling claims (in both cases involving schemes to defraud Canada). *See United States v. Pasquantino*, No. 01-4463, 2002 WL 31159094 (4th Cir. Sept. 30, 2002); *United States v. Boots*, 80 F.3d 580 (1st Cir.), *cert. denied*, 519 U.S. 905 (1996). The Solicitor General's confidence in his continuing ability to prosecute is hardly justified.

The Solicitor General does not suggest that delaying review would assist the Court in its eventual consideration of the important question presented here, or offer any reason why this case would not be an appropriate vehicle for the Court's review. The question has been thoroughly examined in the lower courts, including in Judge Calabresi's dissent in this case, and in Judge Garaufis's first opinion in *European Community v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 483-86 (E.D.N.Y. 2001), and has resulted in sharp and clearly expressed disagreement among the judges who have considered it.

Finally, there is a real danger that the Second Circuit's ill-advised expansion of the revenue rule will be followed in other countries, sowing error in the law (and creating safe havens) that this Court will have no power to correct. The error below clearly "raises issues that are of importance to both Canada and the United States." U.S. Br. 6. The time for review is now.

CONCLUSION

The petition for a writ of certiorari should be granted.

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OCTOBER 2002